TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 42

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, PETITIONER

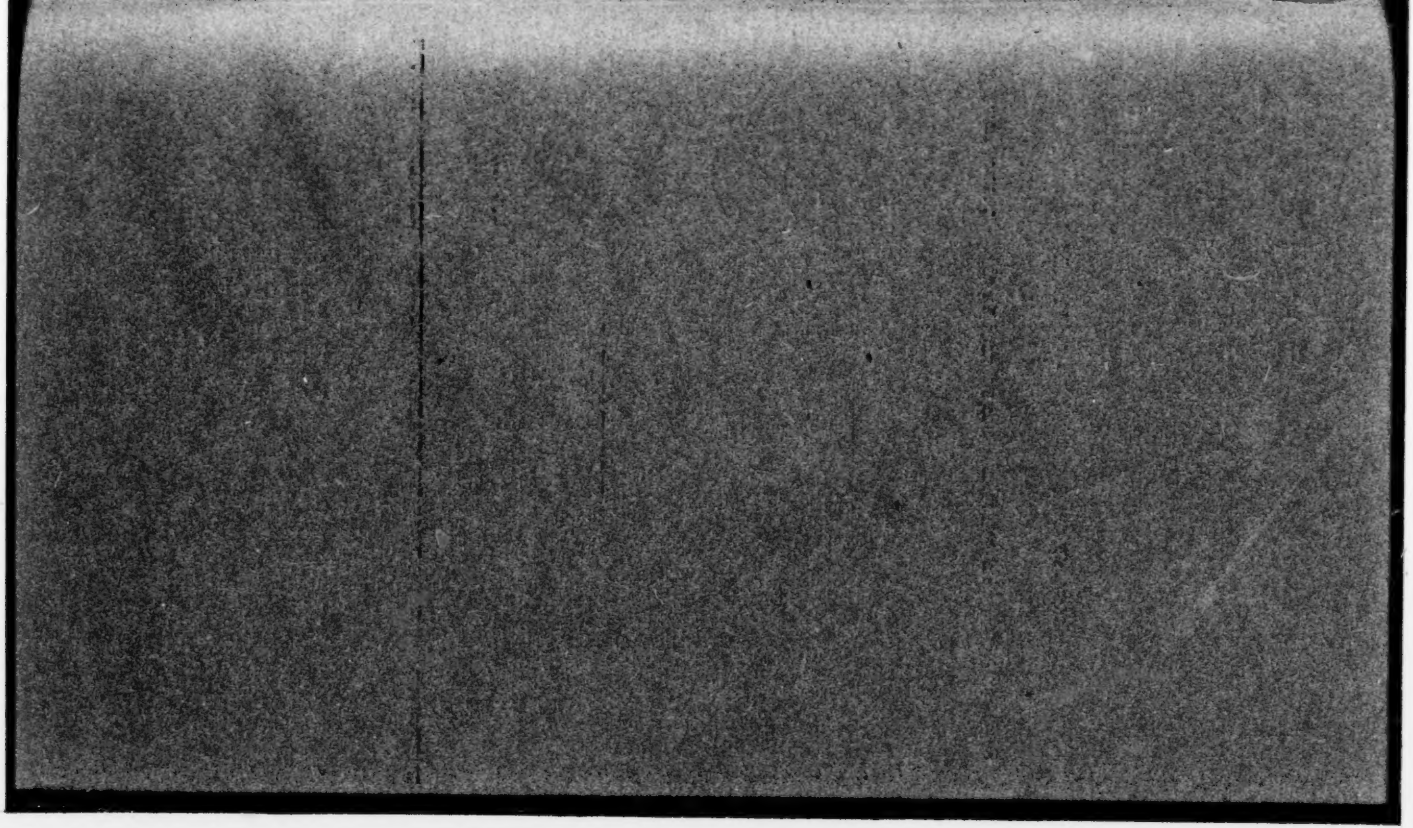
vs.

NORTH GERMAN LLOYD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 18, 1932

CERTIORARI GRANTED MAY 23, 1932



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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement under rule 13, paragraph 4	1	1
Record from D. C. U. S., Southern New York	2	1
Summons	2	1
Complaint	3	2
Answer	9	4
Notice of motion to strike answer, etc	11	5
Affidavit of Rudolph T. Kessemeier	12	6
Letter from W. W. Brown to Collector	16	7
Letter from James I. Parker to North German Lloyd	17	8
Notice of opposition to motion to strike	20	9
Affidavit of George B. Schoonmaker	21	10
Exhibit "A"—Letter from James I. Parker to Commissioner	25	12
Exhibit "B"—Letter from G. E. Tolman to Commissioner	26	13
Exhibit "C"—Letter from James I. Parker to Commissioner	28	14
Order for judgment	31	15
Judgment	33	16
Certificate of probable cause	34	17
Assignments of error	35	17
Petition for appeal and order allowing same	37	18
Citation [omitted in printing]	38	18
Stipulation as to record	39	18
Clerk's certificate [omitted in printing]	40	18
Opinion, Chase, J	41	19
Dissenting opinion, Hand, J	43	21
Judgment	44	21
Clerk's certificate [omitted in printing]	46	22
Order allowing certiorari	47	22

128204—32—1

1 In United States Circuit Court of Appeals for the Second Circuit

L. 43/186

NORTH GERMAN LLOYD, PLAINTIFF

against

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, DEFENDANT

Statement under rule 13, paragraph 4

The action was commenced by the service and filing of a summons and complaint on October 2, 1928.

The answer was filed on June 19, 1930.

There has been no change in the original parties.

The plaintiff's motion for summary judgment and the defendant's motion for a dismissal of the complaint were argued before Honorable William Bondy on October 7, 1930. The motion was granted on October 8, 1930, and the order for judgment was entered on February 20, 1931.

Judgment for the plaintiff was entered on March 2, 1931. A certificate of probable cause was signed March 3, 1931, and entered March 4, 1931, an dthe appeal was taken on June 1, 1931.

2 In United States District Court, Southern District of New York

L. 43, page 186

North German Lloyd

against

Philip Elting, Collector of Customs, Port of New York

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable John C. Knox, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this 1st day of October, A. D. 1928.

[SEAL.]

ALEX GILCHRIST, JR., *Clerk.*

WOOD, MOLLOY & FRANCE,
Plaintiff's Attorneys,
Office and Post Office Address, 25 Broad Street,
Borough of Manhattan, City of New York.

3 **In United States District Court**

(Title omitted.)

Complaint

The plaintiff corporation for its complaint against Philip Elting, collector of customs of the port of New York, alleges and shows as follows:

1. That at all the times hereinafter mentioned the plaintiff was and still is a foreign corporation, organized and existing under and pursuant to the laws of the Republic of Germany.

2. That at all the times hereinafter mentioned the defendant was and still is the collector of customs of the port of New York.

3. That the plaintiff was at all the times hereinafter mentioned the owner of the steamship "Bremen."

4. That heretofore and on or about the 14th day of February, 1924, the plaintiff brought to the United States on its steamship "Bremen" a certain German alien named Joseph Funk.

4 5. That upon the arrival at the port of New York of the said Joseph Funk on February 14, 1924, he was detained by the immigration officers of the United States at Ellis Island, New York Harbor, and subsequently ordered excluded and deported by the Secretary of Labor.

6. That the Secretary of Labor on or about August 4, 1924, in a notice sent to the plaintiff stated that the ascertained facts indicated that a fine of two hundred dollars ($200.00) and a sum equal to that paid by the said alien for his transportation from his initial point of departure to the port of his arrival, to wit, one hundred and ten dollars ($110.00) should be imposed, and that the ground upon which said fine was imposed and said refund of passage money required was that the said Joseph Funk had been brought to the United States by the plaintiff in excess of the quota for the fiscal year beginning July 1, 1923. That the said notice further stated that the plaintiff would be allowed sixty (60) days within which to submit evidence and be heard in the matter.

7. That thereafter the plaintiff in accordance with the statute and regulations made thereunder duly filed its protest with the Secretary of Labor and submitted its reasons why the said fine and refund should not be imposed.

8. That the evidence submitted and the files, records, notices, and regulations of the Bureau of Immigration, Department of Labor, disclosed and established the following facts:

(a) That said Joseph Funk was the holder of a German
5 passport issued to him at Alzeman, Germany, on December 24, 1923, and that he claimed to be a visitor temporarily visiting the United States for the business of settling and collecting an inheritance.

(b) That the said Joseph Funk was the holder of a passport visa No. 96 issued to him by the consul of the United States at Munich, Germany, bearing date January 24, 1924, with the notation thereon that a visa was granted to him for the purpose of proceeding to the United States on business only within the meaning of section 2 of the restrictive immigration law.

(c) That the said Joseph Funk was in possession of the aforesaid consular passport visa at the time of his embarkation upon plaintiff's vessel "Bremen" and presented the same upon his arrival at the port of New York to the immigration officers there stationed.

(d) That section 2 (a) (4) of the restrictive immigration law (the quota act) of May 19, 1921, as amended May 11, 1922, provided, in part, as follows:

"That the number of aliens of any nationality who may be admitted under the immigration laws of the United States in any fiscal year shall be limited to 3 per centum of the number of foreign born persons of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following and they shall not be counted in reckoning in any of the percentage limits provided in this act; * * * (4) aliens visiting the United States as tourists or temporarily for business or pleasure."

6 9. That the only appropriate immigration officers of the United States who could decide and pass upon the admissibility of Joseph Funk as an alien visiting the United States temporarily for business and as an immigrant coming within the provisions of section 2 (a) (4) of the aforesaid act of 1921 as amended, were located and stationed in the United States.

10. That thereafter and notwithstanding the protest and the aforesaid facts the plaintiff was notified by the Secretary of Labor that the said fine and refund would not be refunded, and that the notation of the American consul upon the passport visa of the said Joseph Funk "was not a guaranty of the alien's exempt status," and the plaintiff was further notified by the defendant that the Secretary of Labor had directed that the fine and refund should be imposed.

11. That on or about January 31, 1925, the plaintiff's steamship "Bremen" being in the port of New York and about to sail, the defendant refused to clear the said steamship "Bremen" and to issue clearance papers to her and to permit her departure unless the said sum of money, to wit, three hundred and ten dollars ($310.00), fine

and refund, be paid to it. That thereupon and for the sole purpose of securing said clearance papers and avoiding the detention of the vessel and to permit her departure, and to avoid great and irreparable damage the plaintiff under protest deposited the said sum of three hundred and ten dollars ($310.00) with the defendant.

12. That in bringing to the United States the said Joseph
7 Funk, which status as a nonimmigrant and as exempt from quota restriction was prima facie established by the issuance of the consular passport visa and notation to that effect, and the determination of whose status as a temporary visitor for the purpose of business could only be determined by the immigration officers of the Government of the United States stationed in the United States, the plaintiff did not violate any statute of the United States and did not become liable to any fine, and that the Secretary of Labor was without jurisdiction to impose any fine, and that his said act in fining the plaintiff was a clear abuse of power and that the defendant was without authority in law to demand and retain the aforesaid moneys.

13. That the imposition and exaction of said fine and refund were illegal and wrongful and without warrant of law and in direct conflict with the law in such cases made and provided, and that the said sum of three hundred and ten dollars ($310.00) is still now wrongfully and illegally retained by the defendant.

14. That payment has been duly demanded by the plaintiff and neglected and refused by the defendant.

Wherefore, plaintiff demands judgment against the defendant in the sum of three hundred and ten dollars ($310.00) with interest from the 31st day of January, 1925, together with the costs and disbursements of this action.

WOOD, MOLLOY & FRANCE,
Attorneys for Plaintiff,
Office and Post Office Address, 25 Broad Street,
Borough of Manhattan, New York City.

8 *Duly sworn to by R. T. Kessemeier. Jurat omitted in printing.*

9 In United States District Court

[Title omitted]

Answer

The defendant above named by Charles H. Tuttle, United States attorney for the Southern District of New York, his attorney, for his answer to the complaint herein:

1. Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs No. 7 and No. 8 of the complaint.

2. Denies that the defendant notified the plaintiff that the Secretary of Labor had directed that the fine and refund should be imposed, as alleged in paragraph No. 10 of the complaint.

3. Denies each and every allegation contained in paragraphs No. 12 and No. 13 of the complaint.

Wherefore, defendant demands judgment against the plaintiff dismissing the complaint, together with the costs and disbursements of this action.

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Attorney for Defendant,
U. S. Courts and P. O. Bldg., Borough of Manhattan,
City of New York.

Duly sworn to by Philip Elting. Jurat omitted in printing.

11 **In United States District Court**

[Title omitted.]

Notice of motion to strike answer, etc.

SIR: Please take notice that upon the pleadings in this action and upon the affidavit of Rudolph T. Kessemeier, duly verified the 3rd day of July, 1930, and the exhibits thereto attached and the originals thereof referred to, verifying the cause of action and stating the amount claimed and his belief that there is no defense to the action, the undersigned will make a motion before the District Court of the United States, for the Southern District of New York, at the motion part of said court, room 235, post office building, in the Borough of Manhattan, city of New York, on the 16th day of September, 1930, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for summary judgment striking out the

12 answer of the defendant herein, and that judgment be entered as prayed for in the complaint and for such other and further relief as may be just.

Dated, July 23rd, 1930.

WOOD, MOLLOY & FRANCE,
Attorneys for plaintiff,
Office and Post Office Address, 25 Broad Street,
Borough of Manhattan, New York City.

To CHARLES H. TUTTLE, Esq.,
United States Attorney,
Attorney for Defendant.

In United States District Court

[Title omitted.]

Affidavit of Rudolph T. Kessemeier

STATE OF NEW YORK,
County of New York, ss:

Rudolph T. Kessemeier, being duly sworn, deposes and says:

13 That he is the active passenger traffic manager and the duly authorized representative of the plaintiff herein in the United States. That he verified the complaint herein and is personally familiar with all the facts involved and with the allegations contained in said complaint.

That the action herein is brought to recover a fine or penalty of $200.00 and a refund of passage money to the amount $110.00 imposed upon and required from the plaintiff for bringing an alien to the United States allegedly contrary to the provisions of the immigration law.

That the paragraphs of the complaint which set forth the circumstances and details of the said bringing of the alien in question are all admitted by the defendant in his answer. The only allegations of fact in the plaintiff's complaint which are denied in the answer of the defendant are those contained in paragraphs numbered "7" and "88."

James I. Parker, an attorney, located in the Mills Building, Washington, D. C., represented the plaintiff on its protest to the Department of Labor in this case and in all the proceedings had before the Secretary of Labor. Mr. James I. Parker is now dead, so that it is impossible to secure either his testimony or his affidavit.

However, all the matters in paragraphs "7" and "8" which have been denied upon the ground that the defendant has no knowledge or information sufficient to form a belief as to their truth are all matters of record in the files of the Bureau of Immigration, Department of Labor, all of which are available to the defendant and his counsel, and are also established by the notice of W. W. Brown, inspector in charge, law division, U. S. Department of Labor,
14 and the letter of G. E. Tolman, Acting Commissioner General of Immigration, United States Department of Labor, photostat copies of which are annexed hereto, the originals of which will be produced upon the argument of this motion.

That the following are the facts in this case as shown above and are all in records which are within the power of the defendant and his attorney to produce:

1. That James I. Parker, as attorney for the plaintiff, duly protested to the Secretary of Labor against the enforcement of the penalty herein.

2. That Joseph Funk, the alien in question, was the holder of a passport visa No. 96 issued to him by the United States consul at Munich on January 24, 1924, and that said visa bore the notation, "purpose to proceed to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration Law."

3. That Joseph Funk held the above consular visa at the time of his arrival in New York.

That your deponent is informed and believes that there is only a question of law involved in this action, to wit, whether or not the bringing of an alien in possession of a consular visa, certifying that he was proceeding "to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration law" subjected the plaintiff to a fine on the ground that the alien was in excess of quota. Your deponent is informed and believes that under the law applicable the steamship company is not liable for fine if and when the determination of the admissibility of the alien can only be determined upon his arrival in the United States and that
15 this principle has been repeatedly passed upon and approved by the District and Circuit Court of Appeals of the said district and circuit; that the admissibility of Joseph Funk could only be finally determined by the immigration officials in the United States upon his arrival, and that there is no defense to this action.

That by reason of the foregoing facts the sum of $310.00 with interest from the 31st day of January, 1925, is now due and owing from the defendant to the plaintiff.

Wherefore, deponent prays that the defendant's answer be stricken out and judgment entered for the plaintiff in the sum of $310.00 with interest from the 31st day of January, 1925.

R. T. KESSEMEIER.

Sworn to before me this 3rd day of July, 1930.

[NOTARIAL SEAL.] RUDOLPH SCHLEITNEN,
Notary Public.

Queens Co. No. 1721, Reg. No. 1448.
Cert. filed in N. Y. Co. No. 98, Reg. No. 2–S–128.
Commission expires March 30th, 1932.

16 U. S. Department of Labor, Immigration Service

Filed 98902/669

OFFICE OF COMMISSIONER OF IMMIGRATION,
ELLIS ISLAND, NEW YORK HARBOR, N. Y.
Feb. 14, 1925.

Collector of Customs, port of New York, New York City.

SIR: The department, by letter No. 55395/232 dated Jan. 31, 1925, imposes a fine of $200 in the case of the alien Joseph Funk, ex SS "Bremen," Feb. 14, 1924, your No. 11133, and that amount is to be covered into the Treasury.

Passage money amounting to $110 is to be returned to the alien at in c/o father, Adam Funk, P. O. Alzenan, Bavaria, Germany. Passport issued at Alzenan, Dec. 24/23, visaed at German Consulate at Munich, Jan. 24/24, visa No. 95.

Respectfully,

HF. For the commissioner,

W. W. BROWN,
Inspector in Charge, Law Division.

Copy furnished owners or agents of steamship named above.
North German Lloyd, 32 Bway, City.

17 Phone Main 3628.

James I. Parker

Attorney and Counsellor at Law

Mills Building, Seventeenth Street at Pennsylvania Avenue

WASHINGTON, D. C., *February 19, 1925.*

NORTH GERMAN LLOYD,
32 Broadway, New York City.

GENTLEMEN: I requested a reconsideration of the decision in the Funk case yesterday and to-day received the following letter from the Bureau of Immigration:

"The bureau refers to your letter of to-day, relative to the fine imposed against the S. S. 'Bremen' for bringing to the United States the alien Joseph Funk, in excess of quota.

"It is true that the American consul considered this alien as one coming to the United States for a temporary visit. The bureau considers that no claim can be made, consistently, that reasonable diligence was exercised to ascertain whether he was actually exempt. The alleged reason for his journey to the United States was to collect an inheritance of some $400. His passage was paid by a relative in the United States; he had no money at all upon his arrival; stated that there was no reason why he could not
18 remain in this country permanently; had no return ticket; and was very indefinite as to his business here. Moreover, the cost of the trip would consume all, or almost all, of the amount of the alleged inheritance, provided he did finally obtain what he said he was coming for. The alien had no documentary evidence as to his business here; he was properly excluded; and, in the bureau's opinion, the line has failed to show that it took any real precaution against the transportation of an inadmissible alien.

"The notation of the American consul, in the bureau's opinion, is merely his explanation of his action in granting visa. You will realize fully that this notation was not a guaranty of the alien's exempt status, and that the line, to be in a position to combat fine proceed-

ings, should have examined the alien at the foreign port and should be in a position to show just exactly what was done to avoid a violation of law. Apparently, however, undue weight was attached to the consular notation, and nothing further done. At least, the apparently irrational claims of the alien do not appear to have been challenged or made the subject of any investigation. The bureau realizes that the notation of the consul carries much weight, but it is not conclusive; and, under the law, the steamship company must assume entire responsibility for transporting this inadmissible alien to the United States, as it is felt that such inadmissibility could have been determined prior to his embarkation, through the exercise of a reasonable amount of diligence.

19 "The bureau, therefore, feels that it can not recommend that any change be made in the outstanding instructions.

"(Signed) G. E. TOLMAN,
"*Acting Commissioner General.*"

I pointed out in the request for reconsideration that the alien was not embarked with the intention of being admitted under the quota—that the quota had been exhausted—and that, consequently, the line had not violated the immigration act of 1921, and was not subject to penalty.

But as the bureau has again ruled that the line had not taken due precaution to determine the actual status of this alien, nothing more can be done at this end.

The next step to be taken rests largely in your discretion. If you wish to go into court, the best way to proceed is to enjoin the collector of customs from turning the money into the Treasury. If your line had documentary evidence showing that it had ascertain the alien's status prior to embarkation, such action might be advisable, but since the alien arrived without means, could not prove by witnesses or otherwise that he had business to transact here, and admitted that he would be glad to remain permanently if such admission were possible, there does not appear to be much ground upon which you can base court action. I greatly regret that the situation is not more favorable.

Very truly yours,

JAMES I. PARKER.
E. S.

20 In United States District Court

[Title omitted.]

Notice of opposition to motion to strike

SIRS: Please take notice that the annexed affidavit of George B. Schoonmaker, verified the 23rd day of August, 1930, will be offered by the undersigned in opposition to the motion before the District Court of the United States for the Southern District of New York, at the motion part of the said court, room 235, post office building in the Borough of Manhattan, city of New York, on the 16th day of Sep-

tember, 1930, for summary judgment striking out the answer of the defendant herein and for judgment as demanded in the complaint.

Dated, New York, N. Y., August 23, 1930.

Yours, etc.,

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York,
Attorney for Defendant,
Office and Post Office Address, U. S. Courts and P. O. Bldg.,
Borough of Manhattan, City of New York.

21 To WOOD, MOLLOY & FRANCE, ESQS.,
Attorneys for Plaintiff,
25 Broad Street, New York, N. Y.

In United States District Court

[Title omitted.]

Affidavit of George B. Schoonmaker

STATE OF NEW YORK,
County of New York, ss.:

George B. Schoonmaker, being duly sworn, deposes and says, that he is an assistant United States attorney for the Southern District of New York, and as such has charge of the action herein, and is familiar with the facts and questions involved; that, subsequent to the bringing of this motion by plaintiff, deponent obtained from the Department of Labor of the United States information which indicates that the facts alleged in paragraphs 7 and 8 of the complaint herein are true; that the plaintiff is seeking by the action
22 herein to recover the sum of $310, the amount of a fine imposed by the Secretary of Labor on the plaintiff under the provisions of sec. 6 of the immigration act of May 19, 1921 (as amended by the act of May 11, 1922), and paid to the defendant by the plaintiff under protest; that the said section reads in part as follows:

"That it shall be unlawful for any person * * * to bring to the United States * * * any alien not admissible under the terms of this act or regulations made thereunder, and if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought, such person * * * shall pay to the collector of customs * * * the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure * * *. Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable dili-

gence, by such person * * * prior to the departure of the vessel from the last seaport * * *."

That the plaintiff alleges in paragraph 12 of the complaint herein that the Secretary of Labor abused his power in imposing the said fine; that the defendant in his answer herein has denied the allegations contained in the said paragraph; that deponent believes that the sole issue raised by the pleadings is whether or not the Secretary of Labor acted arbitrarily in imposing the said fine; that deponent believes that the plaintiff cannot prove that the Secretary of
23 Labor so acted without showing what reasons were submitted to the said Secretary as alleged in paragraph 7 of the complaint and also what evidence was submitted to him in support of such reasons; that neither the pleadings nor the plaintiff's affidavit contain such reasons or evidence; that Exhibits A, B, and C annexed hereto are copies of the reasons submitted to the said Secretary by the plaintiff and of one of the answers thereto, the other answer appearing in the plaintiff's affidavit (these exhibits, altho properly part of the plaintiff's case, are submitted herewith in order to assist the court in reaching a final decision herein); that it appears from the said exhibits and from the letter dated February 19, 1925, sent to the plaintiff by its representative, James I. Parker, a copy of which appears in plaintiff's affidavit, that the plaintiff made no independent investigation of the alien's admissibility to the United States but relied solely on the consular visa—reference being made particularly to that part of the said letter from the plaintiff's agent which reads as follows:

"If your line had documentary evidence showing that it had ascertained the alien's status prior to embarkation, such action might be advisable, but since the alien arrived without means, could not prove by witnesses or otherwise that he had business to transact here, and admitted that he would be glad to remain permanently if such admission were possible, there does not appear to be much ground upon which you can base court action."

That deponent believes that the aforesaid facts show that
24 as a matter of law the action of the Secretary of Labor was not arbitrary, and that accordingly, on motion by the defendant the complaint should be dismissed; that deponent believes that the plaintiff concedes that the alien was not in fact an alien visiting the United States as a tourist or temporarily for business or pleasure and concedes that he was brought to the United States in excess of the quota allotted to his country; that deponent believes that the plaintiff concedes that the alien was not admissible to the United States under the terms of the aforesaid act or the regulations thereunder; that deponent believes that the admissibility of each and every alien is always a matter for determination by the immigration authorities in the United States, and that the only sensible construction of section 6 of the said act places on the steamship company the burden of making an independent investigation as to the

admissibility of each alien—the Secretary of Labor not imposing a fine when the steamship company satisfies him that it did not know and could not have ascertained by reasonable diligence that the alien would be denied admission by the immigration authorities in the United States; and deponent accordingly prays that the motion of the plaintiff be denied and that the complaint be dismissed with costs.

GEORGE B. SCHOONMAKER.

Sworn to before me this 25th day of August, 1930.

[SEAL.] RICHARD L. BALTIMORE,
Notary Public.

New York Co. No. —.
New York Co. Register's No. —.
Commission expires March 30, 1931.

25 *Exhibit A to affidavit*

Phone Main 3628.

James I. Parker

Attorney and Counsellor at Law

Mills Building, Seventeenth Street at Pennsylvania Avenue

WASHINGTON, D. C., *January 28, 1925.*

(55395/232. Joseph Funk)

THE COMMISSIONER GENERAL OF IMMIGRATION,
Washington, D. C.

SIR: It is respectfully submitted that according to the minutes the notation on the passport in this case reads "Proceeds to the United States on business only," etc., and that the testimony of passengers as well as of relatives clearly indicates that the passenger would leave this country immediat'ly after an inheritance was settled.

Attention is called to the fact that the notation made by the consul and the statement made by the passengers before the B. S. I. justify the department in concluding that the North German Lloyd's officials acted in good faith.

It is also respectfully submitted that the record shows a state of facts which it is believed justifies the conclusion that the line did not know and could not have ascertained by the exercise of
26 reasonable diligence prior to embarkation of this alien that he would be found to be inadmissible on his arrival on this side.

I respectfully request, therefore, on behalf of the line in view of the record facts and the line's apparent good faith that no penalty be imposed in this case but that the entire deposit covering both fine and passage money be returned to it and that I be advised of the action taken.

Very respectfully,

NORTH GERMAN LLOYD,
By JAMES I. PARKER,
Attorney.

Exhibit B to affidavit

55395/232.

JANUARY 31, 1925.

COMMISSIONER OF IMMIGRATION,
Ellis Island, N. Y. H.

The bureau refers to your letter of January 10th, No. 98902/669, relative to proposed fine against the S. S. "Bremen," arriving on February 14, 1924, for bringing to the United States the alien Joseph Funk, in excess of the annual quota allotted to Germany, which had been exhausted on January 27, 1924.

The line protests against the imposition of a fine, on the ground that the record will show that there was reasonable diligence shown in accepting this alien, as well as good faith, and that no penalty should be assessed against the company.

27 The record shows that the alien claimed to be coming to the United States to collect an inheritance amounting to about $400 in value. It cost him about half of this amount to come, and though he intimated that he was to return abroad before long, admitted that there was no special reason why he could not remain permanently. The testimony of a witness showed an indefiniteness as to the alleged inheritance which is rather surprising, if it be true that such a thing exists. His passage was paid by a relative in the United States.

The alleged reason for the journey of this alien to the United States was so poor, considering the cost of his ocean passage alone, that the board of special inquiry and department found themselves unable to accept his claim that he would return abroad after a temporary visit. He was not in a position, financially, to make such a journey, had to be assisted by others to come, and admitted that there was no reason for his going back to Germany.

In the bureau's opinion, the line has utterly failed to show that it could not have ascertained, at the foreign port of embarkation, that the alien was inadmissible.

It is ruled, therefore, that the penalty as provided in the act of May 11, 1922, has been incurred, and you are directed to take appropriate action whereby the sum of $200, now on deposit on account of said alien, may be covered into the Treasury as an immigration fine.

The amount of passage is to be returned to the alien, who was deported.

G. E. TOLMAN,
Assistant Commissioner General.

Approved:

———— ————,
Assistant Secretary.
JWB.

28 *Exhibit C to Affidavit*

Phone Main 3628.

James I. Parker

Attorney and Counsellor at Law

Mills Building, Seventeenth Street at Pennsylvania Avenue

WASHINGTON, D. C., *February 18, 1925.*

COMMISSIONER GENERAL OF IMMIGRATION,
Washington, D. C.

(55395/232 Joseph Funk, S. S. "Bremen." Special. Application to reopen and reconsider departmental decision of January 30, 1925)

SIR: I am in receipt of notice from the bureau advising me of the imposition of a fine of $200 against the line in the above designated case, and am submitting herewith at the request of and on behalf of the line an application for the reopening and reconsideration of that decision.

This alien was embarked by the North German Lloyd as a visitor under section 2 (a) (4) of the act of May 19, 1921, as extended, which provides that "aliens visiting the United States as tourists or temporarily for business or pleasure" shall not be counted in reckoning any of the percentage limits provided in this act.

29 Paragraph 10, of rule 22, provides that "where an alien is brought to the United States in violation of the provisions of the act of May 19, 1921, as amended by Public Resolution 55, approved May 11, 1922, the transportation agency bringing such alien shall pay to the collector of customs $200 for each alien so brought and in addition refund cost of transportation."

It is respectfully submitted that transportation was granted to this alien as exempt from the quota, that the quota for Germany had been exhaused, that both the American consul and the agents of the line believed the statements made by the alien bona fide as to his reason for coming to this country, that the consul was convinced of his visitor status and so certified that fact on his visa.

The fact that the alien was unable to prove his claim before the board of special inquiry has no bearing, it is submitted, on the fines case since he was embarked as a visitor and consequently was not "brought to the United States in violation of the provisions of the act of May 19, 1921, as amended by Public Resolution 55, approved May 11, 1922."

It is further submitted that the alien used fraudulent statements to gain transportation to both the consul and the line as to his reasons of coming to this country, and since the statements of the alien before the board of special inquiry differ from his statements abroad, it is an apparent attempt to defraud both the line and the Government, and it is not believed that it was the intent of Congress to penalize a line in such cases, nor to have such aliens profit by the refund of the passage money.

30 In view of the apparent good faith of the line in embarking this alien only after he had claimed exemption from the quota, it is respectfully requested that the outstanding instructions imposing a fine be rescinded, and that the entire amount now on deposit be returned to the line. I ask that I be advised of the action taken.

Very respectfully,

JAMES J. PARKER,
Per J. E. L.,
Attorney for North German Lloyd.

MEMO. ENDORSED

Motion granted on the authority of Compagnie Francaise de Navigation A Vapeur v. Elting, 19 Fed. (2) 773. See Dollar SS. Line v. Hyde, 23 Fed. (2) 910.

Oct. 8, 1930.

WM. BONDY, *U. S. D. J.*

31 In United States District Court, Southern New York

L. 43, p. 186

NORTH GERMAN LLOYD, PLAINTIFF

against

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, defendant

Order for judgment, Feb. 20, 1931

The plaintiff having moved this court for summary judgment as demanded in the complaint and the defendant having also moved for summary judgment dismissing the complaint,

Now, on reading and filing the plaintiff's notice of motion, dated July 23rd, 1930, and the affidavit of Rudolph T. Kessemeier, July

verified July 3rd, 1930, and the exhibits therein referred to, and the defendant's notice of motion, dated August 23rd, 1930, and the affidavit of George B. Schoonmaker, verified August 23rd, 1930, and the exhibits therein referred to, and the pleadings herein, and

after hearing Melville J. France, Esq., of counsel for the
32 plaintiff, and George B. Schoonmaker, Esq., assistant United States attorney, of counsel for the defendant, and due deliberation being had thereon:

On motion of Wood, Molloy & France, attorneys for the plaintiff, it is

Ordered, that the motion for judgment as demanded in the complaint be and the same hereby is granted and the answer stricken out and the motion for judgment dismissing the complaint be and the same hereby is denied, and judgment is hereby directed in favor of the plaintiff in the sum of three hundred and ten dollars ($310.00) with interest from the 31st day of January, 1925, with costs of action; and it is further

Ordered that pursuant to section 989 of the Revised Statutes of the United States a certificate that there was probable cause for the acts done by the defendant, the collector of customs, be granted.

WM. BONDY, *U. S. D. J.*

33 In United States District Court, Southern District of New York

L. 43, p. 186

NORTH GERMAN LLOYD, PLAINTIFF

against

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, defendant

Judgment

A motion for summary judgment having been regularly made before the Honorable William Bondy, at a stated term of this court, and the court having granted the motion and an order having been entered herein on the 20th day of February, 1931, directing that judgment be entered in favor of the plaintiff and against the defendant in the sum of $310.00 with interest thereon from the 31st day of January, 1925, with the costs of the action.

Now on motion of Wood, Molloy & France, attorneys for the plaintiff, it is

Ordered and adjudged that the plaintiff, North German Lloyd, recover from the defendant, Philip Elting, collector of customs of the port of New York, the sum of $423.15 and the further sum of $20.00 costs as taxed, making a total sum of $443.15.

Judgment signed this 2nd day of March, 1931.

CHARLES WEISER, *Clerk.*

34 In United States District Court

[Title omitted.]

Certificate of probable cause

The plaintiff having commenced this action by personal service of the summons and complaint upon the defendant and the defendant having appeared herein by the United States attorney for the Southern District of New York, his attorney, and a judgment having been entered herein on the 2nd day of March, 1931, in favor of the plaintiff and against the defendant for the sum of $310.00 with interest from the 31st day of January, 1925, together with the sum of $20.00, plaintiff's costs as taxed, amounting in all to the sum of $443.15,

Now, therefore, pursuant to section 989 of the Revised Statutes of the United States (title 28, section 42, U. S. C.) I hereby certify that there was probable cause for the acts done by the defendant, the collector of customs.

Dated New York, N. Y., March 3, 1931.

WM. BONDY, *U. S. D. J.*

35 We hereby consent to the entry of the above certificate of probable cause.

WOOD, MOLLOY & FRANCE,
Attorneys for Plaintiff.

In United States District Court

[Title omitted.]

Assignment of errors

Now comes the defendant by George Z. Medalie, United States Attorney for the Southern District of New York, his attorney, and says that the District Court of the United States for the Southern District of New York in rendering the judgment herein, entered March 2, 1931, in favor of the plaintiff and against the defendant erred in the following respects:

First. The court erred in granting the motion of the plaintiff for summary judgment.

Second. The court erred in striking out the answer of the defendant.

36 Third. The court erred in entering the order granting judgment in favor of the plaintiff.

Fourth. The court erred in entering the judgment in favor of the plaintiff.

Fifth. The court erred in holding that there was no issue of fact to be decided by a trial.

Sixth. The court erred in holding that the Secretary of Labor acted arbitrarily and without authority in imposing the fine involved in the suit.

Seventh. The court erred in refusing to hold as a matter of law that the action of the Secretary of Labor was not arbitrary and unlawful.

Wherefore, the defendant prays that the judgment herein in favor of the plaintiff be reversed and held for naught, and that the defendant be restored to all things which he has lost by reason of the said judgment.

Dated, New York, June 1, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the
Southern District of New York,
Attorney for the Defendant.

37 In United States District Court

[Title omitted.]

Petition for and allowance of appeal

Now comes the defendant, Philip Elting, and says that on the 2nd day of March, 1931, the court entered judgment herein against him in the the sum of $443.15, and that by said judgment certain errors were committed to the prejudice of the defendant, all of which will more fully appear in the assignment of errors filed with this petition.

Wherefore the defendant prays for an appeal from the said judgment to the Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of, for the allowance of the said appeal, and for leave to prosecute the same, and that a transcript of the record and the proceedings in this cause duly authenticated be forwarded to the said Circuit Court of Appeals.

Dated New York, June 1, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the
Southern District of New York.
Attorney for Defendant.

The above appeal is hereby allowed.

Dated New York, June 1, 1931.

WM. BONDY, *U. S. D. J.*

38 [Citation in usual form omitted in printing.]

39 In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a correct transcript of the record in the said District Court in the above entitled matter, as agreed on by the parties.

Dated New York, N. Y., July 29, 1931.

WOOD, MOLLOY & FRANCE,
Attorneys for Plaintiff-Appellee.
GEORGE Z. MEDALIE,
United States Attorney,
Attorney for Defendant-Appellant.

40 [Clerk's certificate to foregoing transcript omitted in printing.]

41 In United States Circuit Court of Appeals for the Second Circuit

No. 129. October Term, 1931

Argued December 18, 1931. Decided January 11, 1932

NORTH GERMAN LLOYD, PLAINTIFF-APPELLEE

v.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Southern District of New York.

Before MANTON, L. HAND, and CHASE, circuit judges.

Opinion

The plaintiff sued to recover a fine imposed by the Secretary of Labor under section 6 of the restrictive immigration act of 1921, known as the quota act (42 Stat. 5), as amended May 11, 1922 (42 Stat. 540), which it paid under protest. From a judgment for the plaintiff, the defendant has appealed. Affirmed.

The plaintiff brought an alien named Joseph Funk on one of its ships to the port of New York in February, 1924, for entry to the United States. Funk had a German passport and a passport visa issued to him by the American consul at Munich, Germany, January 24, 1924, on which appeared the notation "purpose to proceed to the U. S. on business only within the meaning of section 2 of the restrictive immigration law." He was examined before a board of special inquiry at New York, and was ordered deported upon the ground that he was a quota immigrant because he failed to prove his claim that he was visiting the United States temporarily on business. The plaintiff made an unsuccessful application to the Secretary of Labor for remission of the fine and then brought this suit. There was no proof that the plaintiff made any independent investigation of the alien's claim that he was visiting the United States temporarily on business to satisfy itself as to the truth or falsity of his representations and the notation on his passport visa to that effect.

George Z. Medalie, U. S. Atty., of New York City (George B. Schoonmaker, Asst. U. S. Atty., of New York City, of counsel), for appellant.

Wood, Molloy & France, of New York City, for appellee.

CHASE, circuit judge (after stating the facts as above).

This alien was brought to the United States in accordance with section 2 (a) (4) of the above-mentioned statute (42 Stat. 5), which provides that the quota shall not apply to "aliens visiting the

United States as tourists or temporarily for business or pleasure." It is not claimed that the plaintiff acted in bad faith in bringing the alien here. We agree that it had no right to rely upon the visa to establish his claimed status as a quota exempt. United States ex rel. Spinosa v. Curran (D. C.) 4 F.(2d) 613, affirmed 4 F.(2d) 614 (C. C. A. 2). But the plaintiff at least had probable cause to believe that the alien belonged to one of the classes to which the quota did not apply. If his claim was well founded, he was admissible, and the only way that could be finally determined was by the alien coming to some port of entry to the United States to present his evidence of his right to enter to the officials competent to pass upon it. The statute does not forbid bringing such an alien here so that he can satisfy the proper authorities, if possible, that he has the right to enter. Compagnie Francaise de Navigation a Vapeur v. Elting (C. C. A.) 19 F.(2d) 773. The admissibility of this
42 alien did not depend upon any exericse of discretion by the Secretary of Labor as it did in Dollar S. S. Co. v. Hyde, 23 F.(2d) 910 (C. C. A. 9), where the fine was nevertheless held to have been unlawfully imposed; or in North German Lloyd v. Elting, 48 F.(2d) 547 (C. C. A. 2), where the imposition of fines was held lawful. Funk was not in an excluded class or admissible only in the discretion of the Secretary of Labor, but was a nonquota alien if his evidence was credible and of due weight, and so entitled to be heard by the proper officials and to have all his evidence in support of his claim to entry as of right duly considered by them in fixing his status. A transportation company acting in good faith is not liable to a fine for bringing him here for such a purpose. What was said in Compagnie Francaise, etc., v. Elting, supra, on this subject applies with equal force to this case, for his right to enter was absolute if he came here temporarily on business.

Judgment affirmed.

L. HAND, circuit judge, dissents in opinion.

43 In United States Circuit Court of Appeals for the Second Circuit

No. 129. October Term, 1931

Argued December 18, 1931. Decided January 11, 1932

NORTH GERMAN LLOYD, PLAINTIFF-APPELLEE

v.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, defendant-appellant

Appeal from the District Court of the United States for the Southern District of New York.

Before MANTON, L. HAND, and CHASE, circuit judges.

Dissenting opinion

L. HAND, circuit judge (dissenting).

Section 6 of the quota act of 1921 imposes a fine upon any carrier which brings to this country an alien who is "not admissible." If there were no more, it would make the carrier absolutely liable, regardless of the difficulty, or indeed the out and out impossibilty, of detecting admissibles from inadmissibles before embarkation. To moderate the severity of this, the Secretary is given power to remit the fine if he thinks that the carrier could not have discovered the truth by reasonable diligence; but this power is his, not ours. No alien is ever admitted until he gets here and is examined, so that the carrier in all cases takes a chance when it brings one in. That chance may be remote, as for example when the ground for exclusion is a detectable disease; it may be very great, as where the admission depends upon the alien's ability to earn a living, a standard about which people are bound to differ. But in all cases there is some chance, and the carrier must take it and rely upon the lenity of the Secretary, if the alien is excluded.

We did indeed make an exception in Compagnie Francaise v. Elting (C. C. A.) 19 F. (2d) 773, a case where the alien was returning home from a temporary sojourn. This we did because of a departmental rule especially applicable to that situation, under which he was allowed to reserve his evidence until he arrived at the home port. Rightly or wrongly we thought this situation different because of that rule, upon which alone we squarely placed our earlier decision in North German Lloyd v. Elting (C. C. A.) 48 F. (2d) 547, where the facts were in my opinion indistinguishable from those at bar. The exception is now to swallow the rule, and consistently we shall always in the future have to exercise the discretion which the statute gives to the Secretary.

44 In United States Circuit Court of Appeals, Second Circuit

NORTH GERMAN LLOYD, PLAINTIFF-APPELLEE

vs.

PHILIP ELTING, AS COLLECTOR, ETC., DEFENDANT-APPELLANT

Judgment filed Jan. 18, 1932

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

45 [File indorsement omitted.]

46 [Clerk's certificate to foregoing transcript omitted in printing.]

47 Supreme Court of the United States

Order allowing certiorari. Filed May 23, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

47F [Indorsement on cover:] File No. 36,699. U. S. Circuit Court of Appeals, Second Circuit. Term No. 42. Philip Elting, collector of customs, port of New York, petitioner, vs. North German Lloyd. Petition for a writ of certiorari and exhibit thereto. Filed April 18, 1932. File No. 36,699.

U. S. GOVERNMENT PRINTING OFFICE: 1932

FILE COPY

No. [redacted] 42

In the Supreme Court of the United States

OCTOBER TERM, 1931

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, PETITIONER

v.

NORTH GERMAN LLOYD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Page
Questions presented	2
Statutes and regulations involved	2
Statement	3
Specification of errors to be urged	4
Reasons for granting the writ	4
Conclusions	8
Appendix	9–12

CITATIONS

Cases:	
Lamport & Holt v. *Elting*, 51 F. (2d) 1057	7
Lloyd Sabaudo Societa Anonima per Azioni v. *Elting*, 45 F. (2d) 405; C. C. A. 2d, decided February 1, 1932, not yet reported	6, 7
North German Lloyd v. *Elting*, 48 F. (2d) 547	7
Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320	6
United States ex rel. Spinosa v. *Curran*, 4 F. (2d) 613, aff'd 4 F. (2d) 614	5
Statutes:	
Quota Act of May 19, 1921, c. 8, Sec. 2, 42 Stat. 5	9
Act of May 11, 1922, c. 187, Sec. 6, 42 Stat. 540	9–10
Regulations:	
Immigration Rules, 1924, Rule 9, subdivision E	11
General Instruction, Consular, No. 839, issued July 14. 1922, by the Secretary of State	11–12

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. —

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF New York, petitioner

v.

NORTH GERMAN LLOYD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Philip Elting, Collector of Customs of the Port of New York, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above case on January 18, 1932, and reported in 54 F. (2d) 997, affirming a judgment of the United States District Court for the Southern District of New York in favor of respondent, the plaintiff below. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a fine paid by the respondent pursuant to Section 6 of the Quota Act, as amended, for bringing to the United States an alien not admissible under the terms of that Act should be refunded, when the Secretary of Labor has not been satisfied that such inadmissibility "was not known to, and could not have been ascertained by the exercise of reasonable diligence by" the respondent.

2. Whether this discretionary power as to the refund of such a fine, vested by the Quota Act in the Secretary of Labor, was properly exercised by the United States District Court where the latter, contrary to the view of the Secretary, was satisfied that the respondent could not have ascertained the inadmissibility of the alien by the exercise of reasonable diligence.

3. Whether the respondent exercised such reasonable diligence by relying, with no independent inquiry, upon the alien's claim that he was to be a temporary visitor for business purposes and upon his American consular visa issued in January, 1924, and endorsed "purpose to proceed to the U. S. on business only within the meaning of section 2 of the Restrictive Immigration Law."

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix, *infra,* pp. 9–12.

STATEMENT

On February 14, 1924, respondent brought to the United States on its steamship "Bremen" the German alien Joseph Funk. He was in possession of a non-quota passport visa issued to him on January 24, 1924, by the American Consul at Munich bearing the notation "purpose to proceed to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration Law." Both the visa and the stipulation were obtained by fraudulent statements of the immigrant. (R. 29.) The respondent made no inquiry as to the real purpose of the alien's emigration and the truth of his representations abroad. (R. 41.)

On arrival, he was detained by the immigration officials at Ellis Island, and after a hearing by a Board of Special Inquiry was excluded and deported on the ground that he was a quota immigrant and that the quota applicable to his nationality had been exhausted. The reasons for this action appear to have been that the alien arrived without money or a return ticket; his passage had been paid by relatives in this country; he claimed that he was coming here to collect an inheritance of $400, but had no documentary evidence to support this claim; and he stated that there was no reason why he could not remain permanently in this country. (R. 17.)

Respondent was notified that by bringing in a quota immigrant in excess of the quota allowance in violation of the Quota Act of May 19, 1921, as

amended May 11, 1922, it had incurred liability to a fine of $200, plus $110 paid by the alien for passage, and that it would be allowed sixty days in which to be heard. Respondent protested against the proposed fine and thereafter was notified that fine had been imposed. It was paid under protest.

Judgment was entered by the District Court on March 2, 1931, in favor of the respondent, on motion for summary judgment, in an amount of $423.15 and costs taxed at $20 (R. 33), and certificate of probable cause under R. S. 989 (U. S. C., Title 28, sec. 42) was signed on March 3, 1931 (R. 34).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In affirming judgment in favor of respondent.
2. In holding that the consular visa justified respondent in bringing the alien to this country without investigation as to his true status, and that the fine was illegally imposed.
3. In failing to hold that the refusal of the Secretary of Labor to remit the fine was conclusive; and that the fine was legally imposed.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals has erroneously construed an important Federal statute. The Quota Act (42 Stat. 5) as amended May 11, 1922 (42 Stat.

540), provided in Section 6 that a fine, collected under that statute for bringing to the United States an inadmissible alien, "shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by" the person bringing in the alien.

In the instant case respondent brought an alien to the United States. There is no evidence that any investigation was made by the respondent as to his admissibility. The alien claimed to be visiting the United States temporarily on business, but could not establish this claim, and was excluded. His inadmissibility under the Act is conceded. The fine was collected from the respondent pursuant to the provisions of the Quota Act, and although the Secretary of Labor was repeatedly appealed to, he refused to remit the fine.

Under these circumstances, we submit, the court below erred in allowing recovery. It is clear that this fine was legally collected, for the alien was inadmissible and the respondent brought him to the United States. The alien secured a non-quota visa from the United States Consul and the respondent apparently transported him in reliance upon the visa. But this it had no right to do. *United States ex rel. Spinosa v. Curran,* 4 F. (2d) 613 (E.D.N.Y.), affirmed, 4 F. (2d) 614 (C. C. A. 2d). The consular instructions, *infra,* p. 11, direct the issuance of such a visa regardless of the Consul's

opinion as to the admissibility of the alien. The alien's claims that he was exempt from the quota were in fact fraudulent and upon inquiry regarding his means of returning from his "visit" to the United States, would have been disclosed to be without foundation. Whether or not the steamship company made a proper effort to ascertain his admissibility prior to transporting him was a question solely for the determination of the Secretary of Labor. See *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320. The case was submitted to the District Court on affidavits of the evidence considered by the Secretary in denying the remission of the fine. There was no conflict in the testimony presented to the court. The Quota Act gave the District Court no authority to review the decision of that officer, since there was evidence to support his decision.

This was recognized by the Circuit Court of Appeals for the Second Circuit in the recent case of *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting,* decided February 1, 1932, not yet reported, where the court stated:

> Determination of the fact of foreign detectability of an excluding condition has been left to what will satisfy the Secretary of Labor in that regard. This means that whatever the Secretary of Labor decides, provided his decision is neither arbitrary nor capricious, is final.

2. The decision of the Circuit Court of Appeals in the instant case is in conflict with other decisions

in that circuit. Conflict with *North German Lloyd* v. *Elting,* 48 F. (2d) 547 (C. C. A. 2d), is sharply emphasized by the dissenting opinion of Judge L. Hand, who states that in that case "the facts were in my opinion indistinguishable from those at bar." There a suit for recovery of a similar fine for bringing in an alien inadmissible because of a physical defect was dismissed because the Secretary refused to exercise his discretion by refunding the fine. The most recent decision of the Circuit Court of Appeals in an immigration fine case is similar. In *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting, supra,* the decision of the District Judge, reported in 45 F. (2d) 405, 410, upholding fines imposed for bringing into the United States certain aliens inadmissible because of physical defects, was affirmed on this point. It is difficult to reconcile the opinion in the instant case with these other decisions of the same court. This conflict of opinion is reflected in the decisions of the District Courts. *Lamport & Holt* v. *Elting,* 51 F. (2d) 1057 (S. D. N. Y.).

3. The questions presented by this petition are important and should be settled. There is much litigation for recovery of these fines. In the District Court for the Southern District of New York there are approximately 2,000 causes of action of this character pending, and 555 of them involve the general question in the instant case. There are many presenting the precise issue here. The present unsettled state of the law with re-

gard to such cases causes hardship to transportation companies, and presents grave difficulties to the Government officers charged with the administration of the immigration laws. A review by this Court of the questions presented in this petition will go far toward settling the law and will materially relieve the burden of litigation in the lower Federal courts.

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

APRIL, 1932.

APPENDIX

STATUTES AND REGULATIONS

The Quota Act of May 19, 1921, c. 8, 42 Stat. 5, provided in part:

* * * * *

SEC. 2. (a) That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following, and they shall not be counted in reckoning any of the percentage limits providing in this Act: * * * (4) aliens visiting the United States as tourists or temporarily for business or pleasure;

* * * * *

(d) When the maximum number of aliens of any nationality who may be admitted in any fiscal year under this Act shall have been admitted all other aliens of such nationality, except as otherwise provided in this Act, who may apply for admission during the same fiscal year shall be excluded:

* * * * *

The Act of May 11, 1922, c. 187, 42 Stat. 540, amended the Quota Act by adding the following provision:

SEC. 6. That it shall be unlawful for any person, including any transportation company other than railway lines entering the

United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States either from a foreign country or any insular possession of the United States any alien not admissible under the terms of this Act or regulations made thereunder, and if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. No vessel shall be granted clearance papers pending the determination of the liability to the payment of such fine, or while the fine remains unpaid; except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine. Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such person, or the owner, master, agent, or consignee of the vessel, prior to the departure of the vessel from the last seaport in a foreign country or insular possession of the United States.

The Immigration Rules of 1924 provided in part:

> Rule 9, subdivision E.—Aliens visiting the United States as tourists or temporarily for business or pleasure for a period not to exceed six months shall not be subject to the provisions of section 2 (a) of said Act of May, 1921, as amended, nor shall they be counted in reckoning any of the percentage limitations provided in said act.

General Instruction, Consular, No. 839, issued by the Secretary of State on July 14, 1922, and in effect until June 12, 1924, provided in part:

> SECTION 12. * * *—In the work of alien visa control it is the desire of the Department that consular officers shall be of the greatest possible assistance to the Bureau of Immigration, Department of Labor. Consular officers are, however, not authorized to assume abroad the functions vested by law in the immigration officers of the United States of deciding upon the admissibility of aliens after arrival at an American port.
>
> Nevertheless, in order to prevent or avoid so far as possible hardships and dangers involved in deportation under present conditions, the consular officer to whom a passport is presented for visa shall endeavor to ascertain as far as practicable whether the holder is a member of any of the classes excluded from the United States by the provisions of section 3 of the immigration act of February 5, 1917. If an alien, after submitting to a consular officer the alien's declaration on Form 228, appears in the consul's judgment to fall clearly under one of the classes liable to exclusion, the consul shall so advise the alien, informing him of the serious risk he is taking in attempting

to enter the United States and acquainting him with the probability that he will be excluded from the United States and deported. If the alien nevertheless insists upon proceeding, the consular officer shall visa his passport if it is valid, and if there is no other reason for refusal.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1932

MAY 1
CHARLES ELMORE CROPLEY

FILE COPY

No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1931

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, PETITIONER

v.

NORTH GERMAN LLOYD

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In the Supreme Court of the United States

No. 885

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, petitioner

v.

NORTH GERMAN LLOYD

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, in its brief in opposition to the Government's petition for a writ of certiorari in this case, contends that the case does not warrant review, since it arose under the Quota Act of 1921 as amended, a statute superseded in part by the later Immigration Act of 1924. The pertinent language of these two statutes is so similar that it is evident upon examination of them that the construction of the former will in the majority of cases control that of the latter. The applicable sections of the Quota Act are set forth in the appendix to the Government's petition. The corresponding sections of the Immigration Act of 1924 are printed in the Appendix, *infra*, p. 4.

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It is apparent that the only difference between the two statutes which could possibly cause any different construction of their pertinent provisions is that the 1924 Act expressly renders unlawful the bringing into this country of "any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant." This is more specific than the earlier provision against the bringing in of "any alien not admissible under the terms of this Act or regulations," but adds nothing to the meaning of the earlier Act and regulations which contain in substance these additional provisions of the 1924 Act. The statutory provisions chiefly concerned in this case, those as to the refund of fines after satisfying the Secretary of Labor of the transportation company's diligence, are almost identical in the two Acts.

The respondent urges that the case is of no importance, as it arose under "a defunct statute." On April 29, 1932, there were 506 causes of action pending in the District Court for the Southern District of New York which arose under this Quota Act of 1921, of which approximately 250 will apparently be controlled by the decision in the instant case. A reexamination of the pending cases gives ample support for our statement that the questions presented by the Government's petition are of real importance.

A petition for certiorari is being submitted to this Court in No. 902, *Lloyd Sabaudo Societa Anon-*

ima Per Azioni v. *Philip Elting.* This decision of the Circuit Court of Appeals for the Second Circuit is cited in our petition in the instant case, at page 7, as difficult of reconciliation with the decision below. The fifteenth cause of action in the *Lloyd Sabaudo* case involved the Secretary's refusal to refund a fine imposed for bringing to the United States an inadmissible alien who had secured an improperly issued nonquota visa as had the alien in the instant case. At least eight of the fifteen aliens involved in the *Lloyd Sabaudo* case were brought into the United States while the Quota Act as amended on May 11, 1922, was in force. (See Record in *Lloyd Sabaudo* case, pages 60–65, 303–304, 319, 359, 370, 403.) The Government is not opposing the issuance of the writ in the *Lloyd Sabaudo* case. A review of the instant case is equally important.

Respectfully submitted.

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Solicitor General.
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Assistant Attorney General.
BRADLEY B. GILMAN,
Attorney.

MAY, 1932.

APPENDIX

The Immigration Act of 1924, c. 190, 43 Stat. 153, 154, 159, 163, provides in part:

> SEC. 11. (a) The annual quota of any nationality shall be 2 per centum of the number of foreign-born individuals of such nationality resident in continental United States as determined by the United States census of 1890, but the minimum quota of any nationality shall be 100.
>
> SEC. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * * (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, * * *.
>
> SEC. 16. (a) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a nonquota immigrant.
>
> (b) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person, or transportation company, or the master, agent, owner, charterer, or consignee of any such vessel,

shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, and in addition a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. No vessel shall be granted clearance pending the determination of the liability to the payment of such sums, or while such sums remain unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of an amount sufficient to cover such sums, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(c) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such person, and the owner, master, agent, charterer, and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a non-quota immigrant.

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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1932

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, PETITIONER

v.

NORTH GERMAN LLOYD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	3
Specification of errors	5
Summary of argument	6
Argument:	
I. The fine was legally imposed	10
II. The determination of the Secretary that the fine should not be remitted or refunded is not subject to judicial review, at least in the absence of a manifest abuse of discretion or clearly arbitrary action	21
III. The refusal of the Secretary to remit the fine was not arbitrary or capricious	29
Conclusion	34
Appendix (statutes and regulations)	

CITATIONS

Cases:	
Bermuda & West Indies S. S. Co. v. *Elting*, 45 F. (2d) 411	28
Chang Chan v. *Nagle*, 268 U. S. 346	11
Clyde S. S. Co. v. *United States*, 33 F. (2d) 343	28
Commercial Inv. Trust Corporation, In re, 31 F. (2d) 494	23
Compagnie Francaise de Navigation a Vapeur v. *Elting*, 19 F. (2d) 773	28
Compagnie Generale Transatlantique v. *United States*, 51 F. (2d) 1053	28
Cunard S. S. Co. v. *Stranahan*, 134 Fed. 318	28
Denholm Shipping Co. v. *Elting*, 55 F. (2d) 422	27
Dollar S. S. Line v. *Hyde*, 23 F. (2d) 911	28
Dollar S. S. Line v. *Elting*, 51 F. (2d) 1035	28
Dorsheimer v. *United States*, 7 Wall. 166	23
Duquesne Steele Foundry Co. v. *Burnet*, 283 U. S. 799	24
General Finance Co. v. *United States*, 45 F. (2d) 380	23
Lamport & Holt v. *Elting*, 51 F. (2d) 1057	27
Lloyd Royal Belge Societe Anonyme v. *Elting*, 55 F. (2d) 340	27
Lloyd Sabaudo Societa Anonima per Azioni v. *Elting*, 55 F. (2d) 1048, No. 48 present term	19, 27
Macheca v. *United States*, 26 Fed. 845	23
McCarl v. *Walters*, 38 F. (2d) 942	23

Cases—Continued. Page

New York & Porto Rico S. S. Co. v. *United States*, 52 F. (2d) 980 27
New York & Porto Rico S. S. Co. v. *United States*, 58 F. (2d) 827 28
Ng Fung Ho v. *White*, 259 U. S. 276 26
North German Lloyd v. *Elting*, 48 F. (2d) 547 ..... 27, 33
Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320 ..... 8, 13, 22
Pan-American Petroleum Co. v. *United States*, 28 F. (2d) 386 28
Polymeris v. *Trudell*, 284 U. S. 279 ..... 22, 26
Public Clearing House v. *Coyne*, 194 U. S. 497 25
Quon Quon Poy v. *Johnson*, 273 U. S. 352 25
Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316 25
Sinclair Navigation Co. v. *United States*, 32 F. (2d) 90 28
Spanish Royal Mail Line Agency, Inc. v. *United States*, 45 F. (2d) 404 ..... 28, 33
Svenska Amerika Linien v. *Elting*, 46 F. (2d) 178 27
The Pilot, 43 F. (2d) 491 23
The Presidente Wilson, 56 F. (2d) 742 27
United States v. *Compagnie Generale Transatlantique*, 26 F. (2d) 195 27
United States ex rel. Walter E. Heller & Co. v. *Mellon*, 40 F. (2d) 808, certiorari denied, 281 U. S. 766 23
United States v. *Ju Toy*, 198 U. S. 253 26
United States v. *Morris*, 10 Wheat. 246 23
United States v. *Williams*, 278 U. S. 255 24
United States ex rel. Spinoza v. *Curran*, 4 F. (2d) 613, affirmed, 4 F. (2d) 614 11
W. & C. T. Jones S. S. Corp. v. *Hamilton*, 255 Fed. 799 28
Williamsport Co. v. *United States*, 277 U. S. 551 24
Work v. *Rives*, 267 U. S. 175 25

Statutes:
Immigration Act of 1917, c. 8, 39 Stat. 874:
Sec. 3 (q) (U. S. C., Title 8, Sec. 136 (q)) 19
Sec. 9, as amended by Sec. 26 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 145) 26
Quota Act of 1921, c. 8, 42 Stat. 5, as amended by the Act of May 11, 1922, c. 187, 42 Stat. 540:
Sec. 2 (a) (4) 35
Sec. 6 35
Act of May 11, 1922, c. 187, Sec. 3, 42 Stat. 540 35
Immigration Act of 1924, c. 190, 43 Stat. 153:
Sec. 2 (f) (U. S. C., Title 8, Sec. 202 (f)) 32
Sec. 2 (g) (U. S. C., Title 8, Sec. 202 (g)) 33
Sec. 16 (U. S. C., Title 8, Sec. 216) 37

Regulations:
Immigration Rules of May 1, 1917 (Aug., 1922, ed.), Rule 28 30
Immigration Rules of February 1, 1924, Rule 9 38

Regulations—Continued. Page
Immigration Rules of January 1, 1930, Rule 13 (B) (2)--- 19
General Instruction Consular No. 839---------- 38
General Instruction Consular No. 926---------- 39
Diplomatic Serial No. 273, dated June 12, 1924, p. 348_ 40
Diplomatic Serial No. 273, dated March 23, 1929, Par. 178---------- 39
Miscellaneous:
Congressional Record, Vol. 62, pp. 6207, 6237---------- 21
Executive Order No. 2932 of August 8, 1918---------- 32
Executive Order No. 4027 of June 14, 1924---------- 32
House Rept. No. 945, 67th Cong., 2d Sess---------- 15, 20
House Rept. No. 1621, 67th Cong., 4th Sess---------- 12
House Rept. No. 350, 68th Cong., 1st Sess---------- 12, 33
Joint Order of the Departments of State and Labor of July 26, 1917---------- 32

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 42

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, petitioner

v.

NORTH GERMAN LLOYD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the District Court for the Southern District of New York, granting the respondent's motion for summary judgment, appears at R. 15. The opinions of the Circuit Court of Appeals (R. 19–21) are reported in 54 F. (2d) 997.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 18, 1932. (R. 21.) The petition for certiorari was filed April 18 and granted May 23, 1932, 286 U. S. 538. (R. 22.) The juris-

diction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a fine may be imposed by the Secretary of Labor upon a steamship company under Section 6 of the Quota Act of 1921, as amended, for bringing to this country an alien who claimed exemption from the quota restrictions on the ground that he was coming as a temporary visitor and who possessed an American consular visa which indicated that he was exempt from the quota, but who, on arrival, was found by the immigration officials to be a quota immigrant brought to the United States in excess of the quota limitations, and who was excluded on such ground.

2. Whether a fine imposed upon the respondent under Section 6, as amended, for bringing to the United States an alien not admissible under that Act may be recovered from the Collector of Customs when the Secretary of Labor has not been satisfied that the inadmissibility of such alien "was not known to, and could not have been ascertained by the exercise of reasonable diligence by" the respondent, and has refused to remit the fine.

3. Whether the refusal of the Secretary to refund the fine was arbitrary or capricious.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 35–40.

STATEMENT

This is a suit by the respondent to recover from the Collector of Customs a fine imposed upon it by the Secretary of Labor under Section 6 of the Quota Act of 1921, as amended by the Act of May 11, 1922, pp. 35–36, *infra,* for bringing to the United States an alien who was inadmissible under that Act. The case was submitted to the District Court upon the pleadings and upon motions for summary judgment by both parties, together with certain affidavits and exhibits. (R. 15.) The following facts appear to be undisputed:

On February 14, 1924, the respondent brought to the United States on its steamship "Bremen" the German alien, Joseph Funk. (R. 2, 4, 7, 12.) At the time of his embarkation the alien represented to the respondent that he was going to the United States on a temporary visit for the purpose of collecting an inheritance (R. 3), and he was in possession of a passport visa, issued to him on January 24, 1924, by the United States consul at Munich, bearing the notation "purpose to proceed to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration Law." (R. 3, 7.) Apparently, the visa was obtained by fraudulent statements of the immigrant. (R. 15.)

Upon arrival in the United States the alien was detained by the immigration officials at Ellis Island, and a hearing was had before a Board of Special Inquiry, which refused to accept the alien's claim that he was visiting the United States tempo-

rarily for business or pleasure. He was thereupon ordered excluded and deported on the ground that he was a quota immigrant and that the quota applicable to his nationality was then exhausted. (R. 2, 12–14.) The action of the Board was based upon the following grounds: The alien arrived without money or a return ticket; his passage had been paid by a relative in this country; he claimed to be coming to the United States to collect an inheritance of $400, but it cost him nearly half that amount to come here and he had no documentary evidence to support this claim; and he stated that there was no reason why he could not remain permanently in this country. (R. 8, 13.)

The respondent was notified by the Secretary of Labor that the ascertained facts indicated its liability to a fine of $200, plus $110 paid by the alien for passage, for bringing to the United States a quota immigrant in excess of the quota, and that it would be allowed sixty days in which to submit evidence and be heard. In order to secure clearance for its vessel, the respondent deposited with the Collector, under protest, the amount of the fine and passage money. (R. 4, 13.) The respondent thereafter filed a protest against the imposition of the fine (R. 2, 10) on the ground that the respondent had accepted the alien for transportation in good faith in reliance upon the consular visa and the notation thereon. (R. 4, 6, 12.) There is no evidence that the respondent made any inquiry as to the truth of the alien's claim to be a temporary

visitor to the United States for the purpose of collecting an inheritance. (R. 8, 9, 11, 19.)

After a hearing, and a rehearing, the Commissioner General and the Secretary of Labor ruled that "no claim can be made, consistently, that reasonable diligence was exercised" by the respondent to ascertain whether the alien was admissible, and that his "inadmissibility could have been determined prior to his embarkation, through the exercise of a reasonable amount of diligence." (R. 8, 9, 12.) The respondent paid the fine under protest. (R. 3, 8, 10, 13.)

Judgment was entered by the District Court in favor of the respondent for $423.15 and costs, taxed at $20 (R. 16), and a certificate of probable cause was issued under R. S. 989 (R. 17). Upon appeal the judgment was affirmed by the Circuit Court of Appeals, Judge L. Hand dissenting. (R. 19–21.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In affirming judgment in favor of the respondent.

2. In failing to hold that the refusal of the Secretary of Labor to remit the fine was conclusive; and that the fine was legally imposed.

3. In holding that the consular visa and notation thereon justified the respondent in bringing the alien to the United States without investigation as to his true status, and that the fine was illegally imposed.

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SUMMARY OF ARGUMENT

I

The fine was legally imposed. Under the first sentence of Section 6 of the Quota Act of 1921, as amended, it was unlawful for any transportation company to bring to the United States any alien not admissible under that Act, and a penalty of $200 was made payable by such company "if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought * * *." In the instant case, the respondent brought to the United States an alien who was inadmissible under the Quota Act, and this fact appeared to the satisfaction of the Secretary. Accordingly, the fine was legally imposed, and the only other question is whether it should have been remitted under the third sentence of Section 6, which provided that—

> Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence * * * prior to the departure of the vessel.

Even if the first and third sentences of Section 6 be so construed as to impose liability for a penalty only upon a finding by the Secretary that the inadmissibility of the alien could not have been ascertained by the exercise of reasonable diligence, the fine in the instant case was legally imposed

since the Secretary found that the respondent could have ascertained that the alien was inadmissible by the exercise of reasonable diligence.

There is no basis for the holding of the Circuit Court of Appeals that Section 6 does not apply to the transportation in good faith of an alien who proves to be inadmissible but whose inadmissibility can be determined with certainty only upon his arrival in the United States. The penalty is predicated upon the bringing to this country of an inadmissible alien, and there is nothing in the statute which exonerates a steamship company from liability because it transported the alien in good faith, or because it had probable cause to believe that the alien was admissible, or because the question of admissibility could be answered with certainty only at the port of arrival.

Even if the statute is construed as imposing liability only if the Secretary finds that the inadmissibility of the alien could have been ascertained by the exercise of reasonable diligence, there is no basis for holding that Section 6 is inapplicable in any case where it can not be known with certainty prior to embarkation that the alien is inadmissible. In the majority of cases diligent inquiry will disclose facts from which it will clearly appear whether or not the alien is admissible, and the carrier may act accordingly. If, in some cases, of which the case at bar is not one, a careful inquiry only discloses facts which leave the question of admissibility in doubt,

we submit that the steamship company acts at its peril if it transports the alien and he is eventually held to be inadmissible. In such a case the company's only redress is an appeal to the discretionary power of the Secretary to remit the fine.

II

The determination of the Secretary that the fine should not be remitted is not subject to judicial review, at least in the absence of a manifest abuse of discretion. The statute expressly declares that no fine shall be refunded unless certain facts appear "to the satisfaction of the Secretary." This Court has said with respect to similar language in a prior immigration law that the power thus lodged in the Secretary "was intended to be exclusive." *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 333.

The instant case is closely analogous to those cases involving the power of the Secretary of the Treasury to remit penalties and forfeitures under the customs and internal revenue laws in cases where he is satisfied as to the lack of fraudulent intent or negligence on the part of the person incurring the penalty or interested in the seized article. These cases hold that the discretion of the Secretary to remit the penalty can not be revised or controlled by the courts.

Even if Section 6 be construed so as to impose liabilty only upon a finding by the Secretary that the steamship company could have ascertained that the alien was inadmissible by the exercise of rea-

sonable diligence, judicial review of the Secretary's action exists only if he has abused his discretion. This Court has frequently pointed out that the administration of the immigration laws has been committed to the Secretary of Labor and that in such administration his findings of fact, within the scope of his authority, are final, unless they are arbitrary or capricious.

III

The refusal of the Secretary to remit the fine was not arbitrary or capricious.

In accepting the alien for transportation the respondent did not make any independent inquiry as to the alien's claim to be a temporary visitor for business purposes, but relied solely upon his possession of a consular visa. Upon arrival in the United States the immigration officials ascertained that the alien was without money or a return ticket, that his passage had been paid by a relative in the United States, and that there was no reason why he could not permanently remain here. Although the alien claimed he had come to this country to collect an inheritance of $400, it cost him nearly half that amount to come to the United States, and he had no documentary evidence whatever to support his claim. Upon these facts he was held not to be a temporary visitor for business purposes and was excluded. The respondent was notified of the proposed fine and given sixty days in which to have a hearing. After a consideration of the proceedings

at Ellis Island and of the respondent's protest, in which it asserted that it had accepted the alien for transportation in good faith in reliance upon the visa, the Secretary determined that the inadmissibility of the alien could have been determined by the respondent prior to embarkation by the exercise of reasonable diligence.

These facts plainly establish that the Secretary did not deny a fair hearing, and that his decision was based upon substantial evidence.

The respondent was not excused from making an independent inquiry as to the alien's status by reason of his possession of a consular visa, which indicated that he was exempt from the quota restrictions, since under the applicable laws and regulations the visa was in no sense a guarantee of the alien's admissibility.

ARGUMENT

I

THE FINE WAS LEGALLY IMPOSED

By Section 2 (a) (4) of the Quota Act of 1921 (p. 35, *infra*) an alien "visiting the United States * * * temporarily for business or pleasure" was exempted from the quota restrictions of that Act,[1] and therefore was entitled to enter the United States, if otherwise admissible, even though

[1] Such an immigrant is sometimes referred to herein as a "nonquota immigrant," although that term was not introduced in the immigration statutes until the Immigration Act of 1924, c. 190, 43 Stat. 153.

the quota of his nationality was exhausted. The alien in the instant case claimed, upon embarkation, to be such an immigrant, and, apparently as a result of fraudulent representations, secured from the United States consul a visa which characterized him as such. Upon arrival he was found by the authorities at Ellis Island not to be visiting the United States "temporarily for business or pleasure" and, since the applicable quota was then exhausted, he was excluded and deported as a quota immigrant brought here in excess of the quota restrictions.[2]

The first sentence of Section 6 of the Quota Act of 1921, as amended by the Act of May 11, 1922,[3] pp. 35–36, *infra*, provided:

> That it shall be unlawful for any person, * * * to bring to the United States * * * any alien not admissible under the terms of this Act or regulations made there-

[2] The power of the immigration authorities to exclude the alien, notwithstanding his possession of the consular visa, indicating that he was exempt from the quota, is clear (*United States ex rel. Spinoza* v. *Curran*, 4 F. (2d) 613 (E. D. N. Y.), affirmed, 4 F. (2d) 614 (C. C. A. 2d), and no attack is made upon the finding of the authorities that the alien was not admissible. See *Chang Chan* v. *Nagle*, 268 U. S. 346.

[3] The Quota Act of 1921, as amended, expired on June 30, 1924. Section 6 thereof, above quoted, was replaced by Section 16 of the Immigration Act of 1924. (U. S. C., Title 8, Sec. 216.) Although there is some change in the language, the provisions of Section 16 of the 1924 Act with respect to the imposition and remission of the penalty seem to be substantially identical with those of Section 6 of the 1921 Act. See pp. 37–38, *infra*. The changes in the phraseology of Section 16 were required by reason of the

> under, and if it appears *to the satisfaction of the Secretary of Labor* that any alien has been so brought, such person * * * shall pay to the collector of customs * * * the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation * * * such latter sum to be delivered * * * to the alien * * *. (Italics ours.)

The third sentence of Section 6 provided:

> Such fine shall not be remitted or refunded unless it appears *to the satisfaction of the Secretary of Labor* that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such person * * * prior to the departure of the vessel * * *. (Italics ours.)

In the instant case the respondent was notified by the Secretary of Labor that the facts indicated its liability to a fine of $200, plus the alien's passage money, for bringing to the United States an immigrant in excess of the quota, and was given sixty

---

altogether new system of "quota" and "nonquota" immigration visas inaugurated by the 1924 Act. (See Annual Report of the Secretary of Labor for 1924, p. 52; House Report No. 350, 68th Cong., 1st Sess.; House Rept. No. 1621, 67th Cong., 4th Sess.) The basis for the penalty was changed. Under the 1921 Act the penalty was imposed for bringing to this country an alien who was inadmissible under that Act; under Section 16 of the 1924 Act the penalty is imposed for bringing to the United States (1) any immigrant without an unexpired visa, and (2) any quota immigrant who has a nonquota visa.

days in which to have a hearing. In order to secure clearance for its vessel the respondent deposited with the Collector, under protest, the amount of the fine and passage money. The respondent thereafter filed a protest against the imposition of the fine, stating that it had accepted the alien for transportation in good faith and in reliance upon the consular visa which indicated that he was exempt from the quota restrictions. After a hearing the Secretary determined that the inadmissibility of the alien could have been ascertained by the respondent prior to embarkation by the exercise of reasonable diligence, and accordingly he refused to remit the fine. (See pp. 3–5, *supra*.)

We contend, first, that under these facts the fine was legally imposed. The language of the statute is clear. If a carrier brings to the United States an alien who is inadmissible under the statute, and if that fact appears to the satisfaction of the Secretary of Labor, imposition of the fine follows. No other facts are necessary elements of the liability.[4] In the instant case the facts upon which statutory liability for the fine is predicated are not in dispute, it being conceded that the respondent brought to the United States an alien who was inadmissible, and that such fact appeared to the satisfaction of the Secretary. Accordingly, liability for the fine was incurred under the express provisions of the statute.

[4] That such a statutory provision is constitutional is clear. *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320.

The only question remaining is whether the fine should have been remitted under the third sentence of Section 6, above quoted. On this point the statute is equally explicit. The fine shall not be remitted or refunded unless it "appears to the satisfaction of the Secretary" that the inadmissibility of the alien could not have been ascertained by the respondent, prior to embarkation, by the exercise of reasonable diligence. In the instant case the Secretary determined that the respondent could have ascertained that the alien was inadmissible by the exercise of reasonable diligence. Accordingly, there is no basis for the assertion that the fine should have been remitted or refunded, unless the decision of the Secretary is subject to review by the courts. As to this, we contend that the Secretary's decision was final. See Point II, pp. 21–29, *infra*.)

It may be suggested that the first and third sentences of Section 6 should be read together, that looking at the section as a whole Congress did not intend any steamship company to be penalized if it had exercised reasonable diligence in endeavoring to ascertain whether the alien was admissible, and that, accordingly, no liability for a fine can be *incurred* unless the Secretary finds that the inadmissibility of the alien could have been ascertained by the exercise of reasonable diligence. We submit that this construction requires an alteration and rearrangement of the language of Section 6 which is wholly unwarranted in view of the plain

wording of that section. When the statute plainly directs that the fine shall be payable if the Secretary finds that the steamship company has brought an inadmissible alien to the United States, the rules of statutory construction afford no authority for holding that the fine shall be payable only if the steamship company fails to use due care in investigating the question of the admissibility of the alien. There is a clear distinction between the *imposition* of a fine and its *remission* or *refund*, and this distinction is made by the statute in unambiguous terms.

Moreover, the suggested construction is contradicted by the legislative history of the statute. Section 6 was not in the Quota Act of 1921, as originally enacted. It was added thereto by Section 3 of the Act of May 11, 1922, c. 187, 42 Stat. 540. (Pp. 35–36, *infra*.) Section 3 of the latter Act, as originally introduced in Congress, imposed a fine upon any person for bringing to the United States an alien who was inadmissible under the statute and ended with the following clause: "and such fine shall not be remitted or refunded." In conference the words quoted were deleted and what is now the third sentence of Section 6 was inserted. (See House Report No. 945, 67th Cong., 2d Sess.) The fact that the provision for the *remission* or *refund* of the fine was inserted subsequently to and separately from the provision providing for the *imposition* of the fine would seem to negative the contention that the statute should be read so as

to impose liability only in the event of a finding by the Secretary of the existence of facts upon which he is authorized to remit or refund the fine.

But even if Section 6 be construed as suggested the disposition of the instant case would not be affected. Under such construction the imposition of the fine would be predicated upon precisely the same test as is the remission of the fine under what we believe is the correct construction of the statute, namely, the appearance of certain facts to the satisfaction of the Secretary of Labor. In the case at bar the Secretary has been satisfied as to the existence of the requisite facts, and so, on either theory of construction, the fine must be regarded as being legally imposed. While possibly the courts might exercise a wider review of an administrative determination of facts upon which the *liability* to a fine is predicated than of a like determination of facts upon which the *remission* or *refund* of a fine is based, it is clear that even in the former case the decision of the Secretary is final unless it be shown that he made an erroneous application of the law, or denied a fair hearing, or that his decision was not based upon any substantial evidence. (Point II, pp. 21–29, *infra.*)

The majority of the Circuit Court of Appeals does not seem to controvert, directly at least, the conclusions above stated, but holds rather that Section 6 is inapplicable to the instant case, and that

therefore the fine was illegal. After pointing out that the alien's admissibility turned on whether or not he was "visiting the United States * * * temporarily for business," and that the only way his admissibility could be finally determined was by "coming to some port of entry to the United States to present his evidence of his right to enter," the court held that "the statute does not forbid bringing such an alien here so that he can satisfy the proper authorities, if possible, that he has a right to enter," and that "a transportation company acting in good faith is not liable to a fine for bringing him here for such a purpose."[5] We submit that this interpretation of the statute is unfounded.

Section 6 does not exonerate from liability a steamship company which brings to this country an inadmissible alien whenever the company can establish that it acted in good faith, or that it had probable cause to believe that the alien was admissible, or whenever the question of admissibility can only be answered with certainty by immigration officials at the port of arrival. Nor does the statute furnish exemption from liability whenever the alien has succeeded in persuading a United States consul that he is admissible and has secured a visa which

[5] It should be noted that the decision did not rest upon the fact of the alien's possession of a consular visa. The court expressly stated that the respondent had no right to rely upon the visa as establishing the status of the alien (R. 20), but was of the opinion that the visa established the good faith of the respondent by giving it probable cause to believe that the alien was admissible. (See pp. 31–33, *infra*.)

so indicates. The statute makes it unlawful "to bring to the United States * * * any alien not admissible under the terms of this Act," and makes the fine payable "if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought." The test is whether the alien was admissible, not whether the steamship company had reason to believe that he was.

Even assuming that the liability for the fine is not predicated upon the bringing to this country of an inadmissible alien, but upon the failure of the steamship company to exercise reasonable diligence,[6] there is no foundation for the conclusion that a fine may not be imposed in any case where it can not be determined with certainty prior to embarkation whether the alien is admissible.

Upon the assumption stated, the test of liability would be whether or not—

> it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence * * *.

The only aliens who are inadmissible under the Quota Act of 1921 are those brought to this country in excess of the quota. Such aliens are of two classes: (1) Aliens admittedly subject to the quota who are transported in the expectation that they will reach the United States prior to the exhaustion

[6] This is apparently the view of the court below, although it does not so state expressly.

of the quota; (2) aliens who claim to be wholly exempt from the quota restrictions but who, upon arrival, with the quota exhausted, are found to be subject to the quota. In the case of *every* alien of the second class, and in the case of *most* aliens of the first class (the only exceptions being where the carrier knows in advance of sailing that the quota is exhausted, in which case no carrier would be so unwise as to transport the alien), final decision as to admissibility or definite knowledge as to admissibility can be made or secured only at the port of arrival.[7] Moreover, at the time of the transaction here involved, as at the present time, any alien arriving in the United States, although plainly inadmissible, possessed the chance of temporary admission under Section 3 (q) of the Immigration Act of 1917. (U. S. C., Title 8, Sec. 136 (q).)[8] Accordingly, if the view of the statute suggested above is accepted the penalty provisions of Section 6 will have practically no application or meaning whatever. If any alien, no matter how doubtful his chances of admission, has the right to present his

[7] See the consular instructions which were in force at the time of the transaction here involved (pp. 38–39, *infra*).

[8] *Lloyd Sabaudo Societa Anonima per Arizoni* v. *Elting*, 55 F. (2d) 1048 (C. C. A. (2d), holds that no fine may be imposed where the alien is actually admitted, even though he is admitted but temporarily. Under the present Immigration Rules, aliens in certain excludable classes can not take advantage of this provision for temporary admission unless permission has been secured prior to departure from abroad. See Immigration Rules of January 1, 1930, Rule 13, (B) (2).

claim to officials in this country, and if any steamship company which can not know definitely prior to embarkation (1) whether such alien is subject to the quota, or (2) whether he will arrive prior to the exhaustion of the quota, may carry the alien to this country without penalty, even though he be eventually excluded, Section 6 is practically nullified.

But the statute need not be given so futile a construction. In the vast majority of cases reasonable diligence by the steamship company will disclose facts from which it will clearly appear whether the alien is exempt from or subject to the quota, and the steamship company may act accordingly. But Congress, solicitous that penalties incurred without fault should not be enforced, provided for remission of the penalty by the Secretary and at the same time limited his authority to cases where with reasonable diligence the inadmissibility could not have been ascertained. Of course, "the burden of proof" is "upon the steamship companies" (House Rept. No. 945, 67th Cong., 2d Sess., p. 3) to demonstrate to the satisfaction of the Secretary that they exercised reasonable diligence. Conceivably there may be cases of which the instant case is not one,* in which diligent inquiry by the steamship company will only disclose facts which leave the question of admissibility in doubt. But

* The respondent made no investigation at all, and the facts, as ascertained at Ellis Island, indicated clearly that the alien was inadmissible. (See pp. 29–31, *infra*.)

even in such cases we submit that the statute requires the steamship company to act at its peril if, doubting admissibility, it transports the alien. That the burden of diligent investigation imposed upon the steamship companies is heavy may be conceded. Doubtless it was in recognition of this that Congress vested the Secretary of Labor with discretionary power to remit the penalty. The possibility of difficulties in the administration of Section 6 was considered at some length in the debates in Congress, but the members who discussed the proposed statute seemed to be uniform in their belief that the Secretary could be trusted to exercise a wise and reasonable discretion.[10] The steamship companies must rely, as has Congress, upon the fairness of the administrative official charged with the enforcement of the law.

II

THE DETERMINATION OF THE SECRETARY THAT THE FINE SHOULD NOT BE REMITTED OR REFUNDED IS NOT SUBJECT TO JUDICIAL REVIEW, AT LEAST IN THE ABSENCE OF A MANIFEST ABUSE OF DISCRETION OR CLEARLY ARBITRARY ACTION

If the fine was legally imposed, a further question is whether it should have been remitted or refunded by the Secretary under the third sentence of Section 6, pp. 35–36, *infra*. As to this question, the petitioner contends that the Secretary's decision not to remit the fine is final, and that it can not be reviewed by the courts, at least in the absence of man-

[10] See Congressional Record, Vol. 62, pp. 6207, 6237.

ifestly arbitrary or capricious action. To be entitled to recover, the respondent must show not only that the fine ought to be refunded "but that the United States, by the only voice authorized to express its will, has said so." (See *Polymeris* v. *Trudell,* 284 U. S. 279, 281.)

In unambiguous language the refund of the fine is predicated upon the appearance of certain facts "to the satisfaction of the Secretary of Labor." Moreover, the statute does not direct that the Secretary *shall* remit or refund the fine if the requisite facts appear, but declares that *no fine shall be remitted or refunded unless the requisite facts appear.* This language, which is in the form of a limitation upon the power of the Secretary, leaves no doubt of the legislative intent to vest in the Secretary the *sole* right to determine whether any fine for which liability has been incurred shall be remitted or refunded. As was stated in *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 333, where this Court dealt with the almost identical language of Section 9 of the Immigration Act of 1903, the power thus lodged in the Secretary "was intended to be exclusive." There this Court stated that the finding of the Secretary, based upon the certificate of the local medical officers that the alien was afflicted with a contagious disease, the existence of which could have been detected at the time of embarkation, was so absolute that the carrier might be deprived of a hearing. (214 U. S. 320, 342–343.)

The power of the Secretary of Labor to remit the penalty incurred is analogous to the power of the Secretary of the Treasury to remit certain penalties and forfeitures under the customs and internal revenue laws when satisfied as to the lack of fraudulent intent or negligence on the part of the person incurring the penalty or interested in the seized article. Such discretion can not be revised or controlled by the courts. *Dorsheimer* v. *United States,* 7 Wall. 166; *United States* v. *Morris,* 10 Wheat. 246, 284–285; *United States ex rel. Walter E. Heller & Co.* v. *Mellon,* 40 F. (2d) 808 (App. D. C.), certiorari denied, 281 U. S. 766; *General Finance Co.* v. *United States,* 45 F. (2d) 380 (C. C. A. 5th); *Macheca* v. *United States,* 26 Fed. 845 (C. C. La.); *In re Commercial Inv. Trust Corporation,* 31 F. (2d) 494 (W. D. N. Y.). See *The Pilot,* 43 F. (2d) 491, 493 (C. C. A. 4th); *McCarl* v. *Walters,* 38 F. (2d) 942 (App. D. C.).

In the *Dorsheimer* case this Court said (p. 174):

> The power intrusted by law to the secretary was not a judicial one, but one of *mercy,* to mitigate the severity of the law. It admitted of no appeal to the Court of Claims, or to any other court.

A like view was expressed by this Court in the *Morris* case, *supra,* where the Court said (p. 285):

> The law declares that * * * he shall have power to mitigate or remit such fine, forfeiture or penalty, * * * if, in his opinion, the same shall have been incurred

> without wilful negligence, or any intention of fraud * * *. The facts are submitted to the secretary, for the sole purpose of enabling him to form an opinion, * * * and the correctness of his conclusion therefrom, no one can question. * * * It would be a singular issue to present to a jury for trial, whether the facts contained in such statement were sufficient or not to satisfy the secretary of the treasury, that there was no wilful negligence or intentional fraud. * * *

Statutory provisions closely similar to those involved in the instant case have frequently been held to invest administrative officials with a discretionary power which is not subject to judicial review. Thus, the decision of the Commissioner of Internal Revenue that a taxpayer is not entitled to a "special assessment" of its excess profits taxes under the Revenue Act of 1918 may not be challenged in the courts, "at least in the absence of fraud or other irregularities." *Williamsport Co.* v. *United States,* 277 U. S. 551, 562; *Duquesne Steel Foundry Co.* v. *Burnet,* 283 U. S. 799. The Director of the Veterans Bureau has exclusive authority to pass upon all claims for compensation under the Adjusted Compensation Act. *United States* v. *Williams,* 278 U. S. 255. The action of the Postmaster General in issuing fraud orders under the postal laws relating to lotteries will not be reviewed by the courts, unless it appears that he has

exceeded his statutory authority. *Public Clearing House* v. *Coyne,* 194 U. S. 497. And the courts have no control by mandamus or injunction over the decisions of the Secretary of the Interior under the public lands laws in a matter involving the exercise of his judgment and discretion, even though that matter involve the construction of a statute. *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Work* v. *Rives,* 267 U. S. 175.

If, as we contend, the fine is incurred upon the bringing of an inadmissible alien to the United States, then, under the decisions just cited, the Secretary's decision not to remit the fine may not be disturbed by the courts. If Section 6 be construed so as to impose liability only upon the condition precedent of a finding by the Secretary that the carrier could have ascertained that the alien was inadmissible by the exercise of reasonable diligence, which finding was made in the instant case, it may be that the courts possess a limited power of review if, and only if, it appears that the Secretary denied a fair hearing, or made an erroneous application of the statute, or that his decision was not based upon any substantial evidence.

This Court has frequently pointed out that the administration of the immigration laws has been committed to the Secretary of Labor, and has held that in such administration his findings of fact, within the scope of his authority, are final unless arbitrary or capricious, and his discretion will not

be interfered with unless an abuse thereof is shown. *Polymeris* v. *Trudell,* 284 U. S. 279; *Quon Quon Poy* v. *Johnson,* 273 U. S. 352; *Ng Fung Ho* v. *White,* 259 U. S. 276; *United States* v. *Ju Toy,* 198 U. S. 253. These decisions are peculiarly applicable to the instant case in view of the specific provision of the statute that the determining facts must be demonstrated "to the satisfaction of the Secretary."

The various provisions of the immigration laws imposing penalties upon steamship companies for bringing diseased, defective, or otherwise inadmissible aliens to the United States [11] have frequently been before the Federal courts, particularly those of the Second Circuit. In construing these provi-

[11] In addition to the statute involved in the instant case, and its successor statute, Section 16 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 216), see Section 9 of the Immigration Act of 1917, as amended by Section 26 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 145). The language used in Section 9 with respect to the various penalties thereby imposed is substantially the same, in each case liability being predicated upon the appearance of certain facts "to the satisfaction of the Secretary of Labor."

One important distinction should be noted. In cases arising under the first two sentences of Section 6 of the Quota Act of 1921, and under Section 16 of the 1924 Act, as we construe those sections, *two* questions may arise, i. e. (1) was the fine legally imposed, and (2) should the fine be refunded. In cases arising under Section 9 of the 1917 Act, as amended by Section 26 of the 1924 Act, the only question which can arise is whether the fine was legally imposed. Section 9 contains an express provision that the fines thereby imposed shall not be remitted or refunded.

sions the courts have been careful to point out that unless manifestly wrong or wholly arbitrary or capricious, the decision of the Secretary is final. *Lloyd Sabaudo Societe Anonima per Azioni* v. *Elting,* 55 F. (2d) 1048 (C. C. A. 2d), now pending before this Court on certiorari, No. 48, present term; *North German Lloyd* v. *Elting,* 48 F. (2d) 547 (C. C. A. 2d); *United States* v. *Compagnie Generale Transatlantique,* 26 F. (2d) 195 (C. C. A. 2d); *New York & Porto Rico S. S. Co.* v. *United States,* 52 F. (2d) 980 (S. D. N. Y.); *Lamport & Holt* v. *Elting,* 51 F. (2d) 1057 (S. D. N. Y). Like conclusions have been reached with respect to the provisions imposing penalties upon steamship companies for failure to detain on board or to deport alien seamen, after notice from the Secretary of Labor.[12] *Denholm Shipping Co.* v. *Elting,* 55 F. (2d) 422 (S. D. N. Y.); *Lloyd Royal Belge Societe Anonyme* v. *Elting,* 55 F. (2d) 340 (S. D. N. Y.); Cf. *The Presidente Wilson,* 56 F. (2d) 742 (C. C. A. 2d).

It is true that in some cases the courts have allowed the recovery of fines imposed by the Secretary, but these decisions were either based upon the holding, express or implied, that the action of the Secretary was arbitrary (*Svenska Amerika Linien*

[12] See Section 10 of the Immigration Act of 1917, as amended by Section 27 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 146) and Section 20 (a) of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 167).

v. *Elting,* 46 F. (2d) 178 (S. D. N. Y.); *Spanish Royal Mail Line Agency, Inc.,* v. *United States,* 45 F. (2d) 404 (S. D. N. Y.); *Clyde S. S. Co.* v. *United States,* 33 F. (2d) 343 (S. D. N. Y.)), or that there was an absence of facts upon which the power of the Secretary to act depended. (*Compagnie Generale Transatlantique* v. *United States,* 51 F. (2d) 1053 (C. C. A. 2d); *Dollar Steamship Line* v. *Elting,* 51 F. (2d) 1035 (C. C. A. 2d); *Sinclair Navigation Co.* v. *United States,* 32 F. (2d) 90 (C. C. A. 5th); *Dollar Steamship Line* v. *Hyde,* 23 F. (2d) 911 (C. C. A. 9th); *Compagnie Francaise De Navigation a Vapeur* v. *Elting,* 19 F. (2d) 773 (C. C. A. 2d); *Pan-American Petroleum & Transport Co.* v. *United States,* 28 F. (2d) 386 (E. D. La.); *W. & C. T. Jones S. S. Corp.* v. *Hamilton,* 255 Fed. 799 (E. D. Va.); *Cunard S. S. Co.* v. *Stranahan,* 134 Fed. 318 (C. C. S. D. N. Y.).) In none of these cases was it suggested that the court could consider *de novo* the evidence before the Secretary and reverse his decision where it took a different view of the evidence.[13]

Consequently, the respondent is not entitled to recover, unless a construction of the statute is

[13] There are one or two District Court cases which seem to proceed upon the assumption that the court may determine for itself whether, on the facts, the fine should be imposed. *New York & Porto Rico S. S. Co.* v. *United States,* 58 F. (2d) 827 (S. D. N. Y.); *Bermuda and West Indies S. S. Co.* v. *Elting,* 45 F. (2d) 411 (S. D. N. Y.). If this is what these decisions hold they can not be supported.

adopted which we believe is unwarranted, and then only if it is shown that the Secretary abused his statutory authority, which fact does not appear.

III

THE REFUSAL OF THE SECRETARY TO REMIT THE FINE WAS NOT ARBITRARY OR CAPRICIOUS

Assuming that the courts possess authority to review, within the limits above described, the action of the Secretary in refusing to remit the fine, the facts in the instant case demonstrate clearly that the Secretary's action was neither arbitrary nor capricious.

At the time of foreign embarkation the alien Funk represented to the respondent that he was exempt from the quota restrictions as an "alien visiting the United States * * * temporarily for business." The purported business was the collection of an inheritance. The respondent made no inquiry or investigation with respect to Funk's claim, but relied solely upon his representations and upon his possession of an American consular visa bearing the notation, "purpose to proceed to the United States on business only." Apparently the alien's representations to both the respondent and the Consul were fraudulent.

Upon arrival in the United States the Special Board of Inquiry ascertained—

> (1) that Funk was without money or a return ticket, (2) that his passage to this

> country had been paid by a relative in the United States, (3) that there was no reason why he could not permanently remain here, (4) that he claimed he had come to collect an inheritance of $400, but it cost him nearly half that amount to come to the United States, and he had no documentary evidence whatever to support his claim.

Upon these facts it was held that Funk was not a temporary visitor for business, and therefore that he was subject to the quota. Since the applicable quota was exhausted, he was excluded. No one questions the propriety of his exclusion.

Thereafter the Secretary notified the respondent that the facts indicated its liability to a fine for bringing to the United States an inadmissible alien, and the respondent was given sixty days in which to have a hearing. Within this period the respondent filed a protest against the imposition of the fine on the ground that it had accepted Funk for transportation in good faith in reliance upon his representations and his possession of the consular visa with the notation thereon. After a consideration of the protest and of the findings of the Special Board of Inquiry the Secretary [14] found that the respondent had not taken "any real precaution against the transportation of an inadmissible alien," and that the inadmissibility of the alien

[14] For the applicable administrative procedure, see Immigration Rules of May 1, 1917 (August, 1922, Edition), Rule 28.

"could have been determined prior to his embarkation, by the exercise of a reasonable amount of diligence." (R. 8, 9.)

Mere recital of the foregoing would seem conclusively to negative the contentions that the Secretary denied a fair hearing or that his decision was not based upon any substantial evidence or that it was in any way an abuse of his discretion. Although the statute required that the respondent exercise reasonable diligence, the burden of proof being upon it to establish that fact to the satisfaction of the Secretary, the facts disclose that it made no independent inquiry of any kind as to the truth of the alien's claim to be a temporary visitor. Had such inquiry been made the respondent would have undoubtedly discovered the same facts which were disclosed by the Special Board of Inquiry, facts which clearly establish that the alien was not what he claimed to be. On this state of proof the Secretary could reasonably find that the respondent could have ascertained, by the exercise of reasonable diligence, that the alien was not coming to the United States for the purpose of collecting an inheritance, as he claimed, and hence that he was inadmissible. As a matter of fact, it is not apparent what other conclusion the Secretary could reasonably have reached on the evidence before him.

The respondent contends that it was excused from making an independent inquiry as to the alien's status in view of the alien's possession of a consular visa which indicated that he was exempt

from the quota restrictions. This contention is unfounded. Although visas had been issued to prospective immigrants by United States consular officers, pursuant to consular instructions,[15] for a considerable period previously, it was not until the Immigration Act of 1924 that the immigration laws required the issuance of consular visas to aliens seeking admission to this country. The departmental instructions in force at the time of the transportation of the alien involved in the instant case (General Instruction Consular No. 839, pp. 38–39, *infra*) expressly stated that consular officers were "not authorized to assume abroad the functions vested by law in the immigration officers of the United States of deciding upon the admissibility of aliens," and in express terms required the consul to issue a visa, if the alien insisted, *regardless of the consul's view as to the alien's admissibility.*[16] In view of these definite provisions of the regulations, if not otherwise (see footnote 2, p. 11, *supra*), it is apparent that respondent was wholly unwarranted in relying upon the visa as establishing the alien's

[15] See the "Joint Order [of the Departments of State and Labor] requiring passports and certain information from aliens who desire to enter the United States during the war," of July 26, 1917. This order was confirmed and continued in existence by Section 31 of Executive Order 2932 of August 8, 1918, which latter order remained in force until superseded by Executive Order No. 4027 of June 14, 1924.

[16] These instructions were in force until July 12, 1924. Section 2 (f) of the Immigration Act of 1924 (U. S. C., Title 8, Section 202 (f)) provides that no immigration visa shall be issued by a consular officer unless it appears to him that

status as an immigrant exempt from the quota restrictions.[17]

Nothing in the applicable statutes or regulations, or otherwise, supports the contention that the alien's possession of a consular visa dispenses with the express requirement of the statute that steamship companies use reasonable diligence to ascertain whether or not the alien is admissible. See *North German Lloyd* v. *Elting*, 48 F. (2d) 547, 550 (C. C. A. 2d).

We submit that not only did the Secretary act upon substantial evidence but that it affirmatively appears that the respondent failed to use reasonable diligence in ascertaining whether or not the alien was admissible. Accordingly, the courts below were in error in holding that the respondent was entitled to recover the fine.

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the alien is admissible. But Section 2 (g) (U. S. C., Title 8, Sec. 202 (g)) provides that:

"Nothing in this act shall be construed to entitle an immigrant, to whom an immigration visa has been issued, to enter the United States, if, upon arrival in the United States, he is found to be inadmissible to the United States under the immigration laws."

The consular instructions issued since the 1924 Act have called attention to the fact that the visa is not a guarantee of admission and have directed the consular officers to call this fact to the attention of the steamship companies and their agents. See General Instruction Consular No. 926, Diplomatic Serial No. 273, dated June 12, 1924, p. 48; *ibid.*, dated March 23, 1929, Par. 178. See also House Rept. No. 350, 68th Cong., 1st Sess., p. 10.

[17] The visa in the instant case should be distinguished from the reentry permit involved in *Spanish Royal Mail Line Agency, Inc.*, v. *United States*, 45 F. (2d) 404 (S. D.

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed and the case remanded to the District Court with instructions to enter judgment for the petitioner.

Respectfully submitted.

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OCTOBER, 1932.

N. Y.), which was an action to recover a fine imposed under Section 9 of the 1917 Act, as amended, for bringing to the United States an illiterate alien. The court held that the reentry permit, which had been issued to the alien by the Commissioner General, imported, as a matter of law, that the alien had been previously legally admitted, which fact in turn imported that at the time of his original entry the alien was able to read. The court further held that the Secretary's decision that the steamship company had failed to exercise "reasonable precaution," where it had accepted the alien for transportation in reliance upon his possession of the permit without investigating whether he was able to read, was arbitrary.

APPENDIX

STATUTES AND REGULATIONS

The Quota Act of May 19, 1921, c. 8, 42 Stat. 5, provided in part:

> SEC. 2. (a) That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following, and they shall not be counted in reckoning any of the percentage limits provided in this Act:
> * * *
>
> (4) aliens visiting the United States as tourists or temporarily for business or pleasure;
>
> * * * * *
>
> (d) When the maximum number of aliens of any nationality who may be admitted in any fiscal year under this Act shall have been admitted all other aliens of such nationality, except as otherwise provided in this Act, who may apply for admission during the same fiscal year shall be excluded:
> * * *

Section 3 of the Act of May 11, 1922, c. 187, 42 Stat. 540, amended the Quota Act of 1921 by adding thereto the following provision:

> SEC. 6. That it shall be unlawful for any person, including any transportation company other than railway lines entering the

United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien not admissible under the terms of this Act or regulations made thereunder, and if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. No vessel shall be granted clearance papers pending the determination of the liability to the payment of such fine, or while the fine remains unpaid; except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine. Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such person, or the owner, master, agent, or consignee of the vessel prior to the departure of the vessel from the last seaport in a foreign country or insular possession of the United States.

The Quota Act of 1921, as amended, expired on June 30, 1924, and Section 6 of that Act was replaced by Section 16 of the Immigration Act of 1924, c. 190, 43 Stat. 153, 163 (U. S. C., Title 8, Sec. 216), which provides:

> SEC. 16. (a) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant.
>
> (b) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person, or transportation company, or the master, agent, owner, charterer, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, and in addition a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. No vessel shall be granted clearance pending the determination of the liability to the payment of such sums, or while such sums remain unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of an amount sufficient to cover such sums, or of a bond

with sufficient surety to secure the payment thereof approved by the collector of customs.

(c) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such person, and the owner, master, agent, charterer, and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a nonquota immigrant.

Immigration Rules of February 1, 1924:

Rule 9, subdivision E.—Aliens visiting the United States as tourists or temporarily for business or pleasure for a period not to exceed six months shall not be subject to the provisions of section 2 (a) of said Act of May, 1921, as amended, nor shall they be counted in reckoning any of the percentage limitations provided in said act.

General Instruction Consular, No. 839, issued by the Secretary of State on July 14, 1922, and in effect until June 12, 1924, provided in part:

SEC. 12. * * *. In the work of alien visa control it is the desire of the Department that consular officers shall be of the greatest possible assistance to the Bureau of Immigration, Department of Labor. Consular officers are, however, not authorized to

assume abroad the functions vested by law in the immigration officers of the United States of deciding upon the admissibility of aliens after arrival at an American port.

Nevertheless, in order to prevent or avoid so far as possible hardships and dangers involved in deportation under present conditions, the consular officer to whom a passport is presented for visa shall endeavor to ascertain as far as practicable whether the holder is a member of any of the classes excluded from the United States by the provisions of section 3 of the immigration act of February 5, 1917. If an alien, after submitting to a consular officer the alien's declaration on Form 228, appears in the consul's judgment to fall clearly under one of the classes liable to exclusion, the consul shall so advise the alien, informing him of the serious risk he is taking in attempting to enter the United States and acquainting him with the probability that he will be excluded from the United States and deported. If the alien nevertheless insists upon proceeding, the consular officer shall visa his passport if it is valid, and if there is no other reason for refusal.

* * * * *

General Instruction Consular No. 926, Diplomatic Serial No. 273, issued by the Department of State on March 23, 1929, provides:

178. It will be noted in section 2 (*g*) of the act that possession of an immigration visa does not entitle an immigrant to admission into the United States if he is found to be inadmissible under the immigration laws upon arrival at a port of entry of the United States. The immigration visa carries a statement to this effect. Consuls will

see that all immigrants are fully informed in this regard and also that steamship companies and other agents of transportation understand this provision of the law. It adds another cogent reason for diligence and care and the Department consequently expects that consuls will not issue immigration visas to persons not entitled under the laws to receive them.

A provision substantially identical to paragraph 178, above quoted, has been included in the consular instructions consistently since the enactment of the Immigration Act of 1924. See General Instruction Consular No. 926, Diplomatic Service No. 273, dated June 12, 1924, p. 348.

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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1932

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, PETITIONER

v.

NORTH GERMAN LLOYD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

INDEX

CITATIONS

Cases: Page

Bermuda & West Indies S. S. Co. v. *Elting*, 45 F. (2d) 411 -- 4

Compagnie Francaise de Navigation a Vapeur v. *Elting*, 19 F. (2d) 773 ---------- 3, 4, 5, 7, 8

Denholm Shipping Co. v. *Elting*, 55 F. (2d) 422 ---------- 8

Dollar S. S. Line v. *Hyde*, 23 F. (2d) 911 ---------- 6, 7

Lamport & Holt v. *Elting*, 51 F. (2d) 1057 ---------- 8

Lloyd Royal Belge Societe Anonyme v. *Elting*, 55 F. (2d) 340 - 8

Lloyd Sabaudo Societa Anomina per Azioni v. *Elting*, 55 F. (2d) 1048, No. 48 present term ---------- 8

Navigazione Libera Triestina v. *United States*, 36 F. (2d) 631 - 8

New York & Porto Rico S. S. Co. v. *United States*, 52 F. (2d) 980 ---------- 8

North German Lloyd v. *Elting*, 48 F. (2d) 547 ---------- 4, 5, 6, 7, 8

Transatlantica Italiana v. *Elting*, 58 F. (2d) 769 ---------- 4

United States v. *Compagnie Generale Transatlantique*, 26 F. (2d) 195 ---------- 8

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The respondent asserts that the only persons who could officially pass upon the admissibility of the alien here involved were the immigration officials at the port of arrival, and that therefore there was no way of its knowing or ascertaining at the time of embarkation whether the alien was admissible. We concede the premise of this argument but deny the conclusion. The facts with respect to the alien's claim to be a "temporary visitor" as disclosed by the investigation at Ellis Island (R. 8, 13) established clearly that the alien's claim was wholly

unwarranted. Had any inquiry as to the alien's status been made by the respondent at the time of embarkation it would have undoubtedly discovered that the alien was not a temporary visitor and therefore that he was inadmissible.

But the respondent contends that the alien had a "right" to have his status determined by immigration officials in the United States, and that therefore it could not be penalized for bringing the alien to the United States in order to assert that right. This argument assumes the very question at issue. While any alien who manages to reach this country unquestionably possesses the privilege of having the local immigration officials pass upon his admissibility, we know of no statute or regulation, and none is cited by the respondent, which provides that any alien such as the one involved in the instant case may be brought to this country for the purpose of having his claim to admission passed upon by the local immigration officials. Whether an alien has a "right" to come to this country to present his claim for admission depends, we submit, upon whether a steamship company may lawfully bring him to this country. Whether, so far as the case at bar is concerned, a steamship company may lawfully bring the alien to this country turns upon Section 6 of the Quota Act, which provides:

> That it shall be unlawful * * * to bring to the United States * * * any alien

> not admissible under the terms of this Act or regulations made thereunder * * *.

Since the alien here involved was "not admissible" under the statute, it was "unlawful" to bring him to this country. There would thus seem to be no basis for the assertion that the alien had a "right" to come here, and *a fortiori* no basis for the assertion that the respondent had the right to transport him.

The respondent relies, as did the court below, upon the earlier decision of the court below in *Compagnie Francaise de Navigation a Vapeur* v. *Elting*, 19 F. (2d) 773 (C. C. A. 2d), a case which also involved Section 6 of the Quota Act, and in which recovery of a fine imposed by the Secretary of Labor under that Section was allowed. We question the correctness of the decision in the *Compagnie Francaise* case since, as in its decision in the case at bar, the court failed to perceive the distinction made by Section 6 between the *imposition* of the fine and its *remission*. But assuming the decision in the case cited to be sound, it is distinguishable from the instant case. There the alien, who held a consular visa, had previously resided in the United States, and claimed to be returning to an unrelinquished domicile. He was admissible as of right if he could rebut the administrative presumption that his domicile had been relinquished by reason of an absence of more than six months. Under the then applicable immigration regulations, the existence

of his former status having been established, he was entitled to present proof on the disputed issue of abandonment to the proper immigration officials. As no such officials were available in the country of embarkation, the court held that he was entitled, *under the statute and regulations,* to appear in this country to present his claim for admission, and that by bringing the alien to this country under those circumstances the steamship company did not violate the law, notwithstanding that the alien was eventually found to be inadmissible. In the instant case the alien never possessed a status which exempted him from the restrictions of the quota and nothing in the statute or regulations conferred upon him the right to come to this country to present his claim for admission. In the *Compagnie Francaise* case [1] the right was founded upon an express provision of the immigration rules.

---

[1] Because of what we believe to have been a faulty approach to the interpretation of the statute, the decision in the *Compagnie Francaise* case seems to have been misapplied in certain District Court decisions. Thus, in *Bermuda & West Indies S. S. Co.* v. *Elting*, 45 F. (2d) 411 (S. D. N. Y.), it was applied to aliens, possessing nonquota visas, who had never been domiciled in the United States, and recovery of fines imposed against the steamship company was allowed on the ground that the "only proper place to determine the correct facts * * * was at New York." See also *Transatlantica Italiana* v. *Elting*, 58 F. (2d) 769 (S. D. N. Y.). If these decisions hold that there can be no liability for a fine where the admissibility of the alien can not be known with certainty until that question has been passed upon by the local immigration officials, they are in conflict with *North German Lloyd* v. *Elting*, 48 F. (2d) 547, *infra*, and, we submit, are wrong.

That the *Compagnie Francaise* case is to be supported only upon the grounds above set forth, and that it does not lay down a general rule that a fine may not be imposed under Section 6 of the Quota Act for bringing to the United States an alien who is inadmissible but whose inadmissibility can not be determined with certainty until he reaches the United States, is apparent, we believe, from the same court's decision in *North German Lloyd* v. *Elting,* 48 F. (2d) 547. That case involved Section 9 of the Immigration Act of 1917, as amended by Section 26 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 145), which declares that it shall be unlawful for any person to bring to the United States any alien afflicted with a mental or physical defect which may affect his ability to earn a living, and provides for the payment of a penalty "if it shall appear to the satisfaction of the Secretary of Labor * * * that the existence of such * * * defect might have been detected by means of a competent medical examination" at the time of embarkation. Under this statute the steamship company is required not only to determine the medical question whether there is a defect, but also the further question whether the defect is such that it may affect the alien's ability to earn a living. The latter question is one which depends largely upon the view which the local immigration officials may take of the particular defect and individual in question, and therefore is one which can not be definitely determined

prior to embarkation any more easily than the question, arising under the Quota Act, whether an alien intends to come to the United States "temporarily for business or pleasure."[2] In other words, in that case, as in the case at bar, the admissibility of the alien could not be determined with certainty until his arrival in the United States, but neither that fact, nor the fact that the alien had been issued a consular nonquota visa, was held sufficient to relieve the steamship company from liability for a fine when, upon arrival, the alien was held to be inadmissible, the Secretary having found that the excluding defect could have been discovered by means of a competent medical examination.

Although not cited by the court below, the respondent relies upon *Dollar S. S. Line* v. *Hyde,* 23 F. (2d) 911 (C. C. A. 9th). In that case, which did not involve Section 6 of the Quota Act,[3] the court allowed recovery of a fine imposed under Section 9 of the Immigration Act of 1917, as amended, for bringing to the United States a diseased alien. The alien in question had lived in Hawaii for eighteen years and was returning, with a permit to reenter the country, from an absence of three

[2] Moreover, in *North German Lloyd* v. *Elting*, *supra*, the Secretary of Labor possessed the discretionary power, under Section 21 of the 1924 Act (U. S. C., Title 8, Sec. 158), to admit the alien under bond. As to this factor, compare *Dollar S. S. Line* v. *Hyde*, 23 F. (2d) 911 (C. C. A. 9th), *infra*.

[3] The attention of the Court is called to the distinction between Section 6 of the Quota Act and Section 9 of the Immigration Act of 1917, as set forth in footnote 11, p. 26, in the petitioner's main brief in the instant case.

months in Japan. Section 3 of the 1917 Act provides that—

> * * * aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe.

Section 9 contains a proviso (U. S. C., Title 8, Sec. 145) that nothing in that section—

> * * * shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or exceptions to section 3 of this Act exempted from the excluding provisions of said section.

The court held that the alien was one who was exempted by Section 3 from the excluding provisions of that section, and that, therefore, under the proviso to Section 9, a steamship company did not incur any liability for bringing such an alien to this country, even though upon arrival he was excluded. Assuming that the decision in the *Dollar S. S. Line* case is sound, which we doubt, it is clearly inapplicable to the statute involved in the instant case.

We believe, as stated by Judge L. Hand in his dissenting opinion (R. 21), that the facts in *North German Lloyd* v. *Elting,* 48 F. (2d) 547, *supra,* are "indistinguishable from those at bar," and that in applying the rule of the *Compagnie Francaise* case to the instant case the majority of the court below failed to perceive that the former case can only be

supported as an exception to the general rule which, when applied to the instant case, destroys the general rule entirely.

In addition to being inconsistent with the *North German Lloyd* case (48 F. (2d) 547), the decision of the court below in the instant case is in direct conflict with *Lamport & Holt* v. *Elting,* 51 F. (2d) 1057 (S. D. N. Y.) and *New York & Porto Rico S. S. Co.* v. *United States,* 52 F. (2d) 980 (S. D. N. Y.), which cases arose under Section 16 of the Immigration Act of 1924.[4] Cf. *United States* v. *Compagnie Generale Transatlantique,* 26 F. (2d) 195 (C. C. A. 2d). It is apparently in conflict with *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting,* 55 F. (2d) 1048 (C. C. A. 2d), No. 48, present term, to be argued immediately after the instant case. See also *Navigazione Libera Triestina* v. *United States,* 36 F. (2d) 631 (C. C. A. 9th); *Denholm Shipping Co.* v. *Elting,* 55 F. (2d) 422 (S. D. N. Y.); and *Lloyd Royal Belge Societe Anonyme* v. *Elting,* 55 F. (2d) 340 (S. D. N. Y.).

Respectfully submitted.

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Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
PAUL D. MILLER,
Attorney.

[4] See footnote 3, p. 11, of the main brief for the petitioner in the instant case.

U. S. GOVERNMENT PRINTING OFFICE: 1932

FILE COPY

No. 388. 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

PHILIP ELTING, Collector of Customs, Port of New York,

Petitioner,

v.

NORTH GERMAN LLOYD,

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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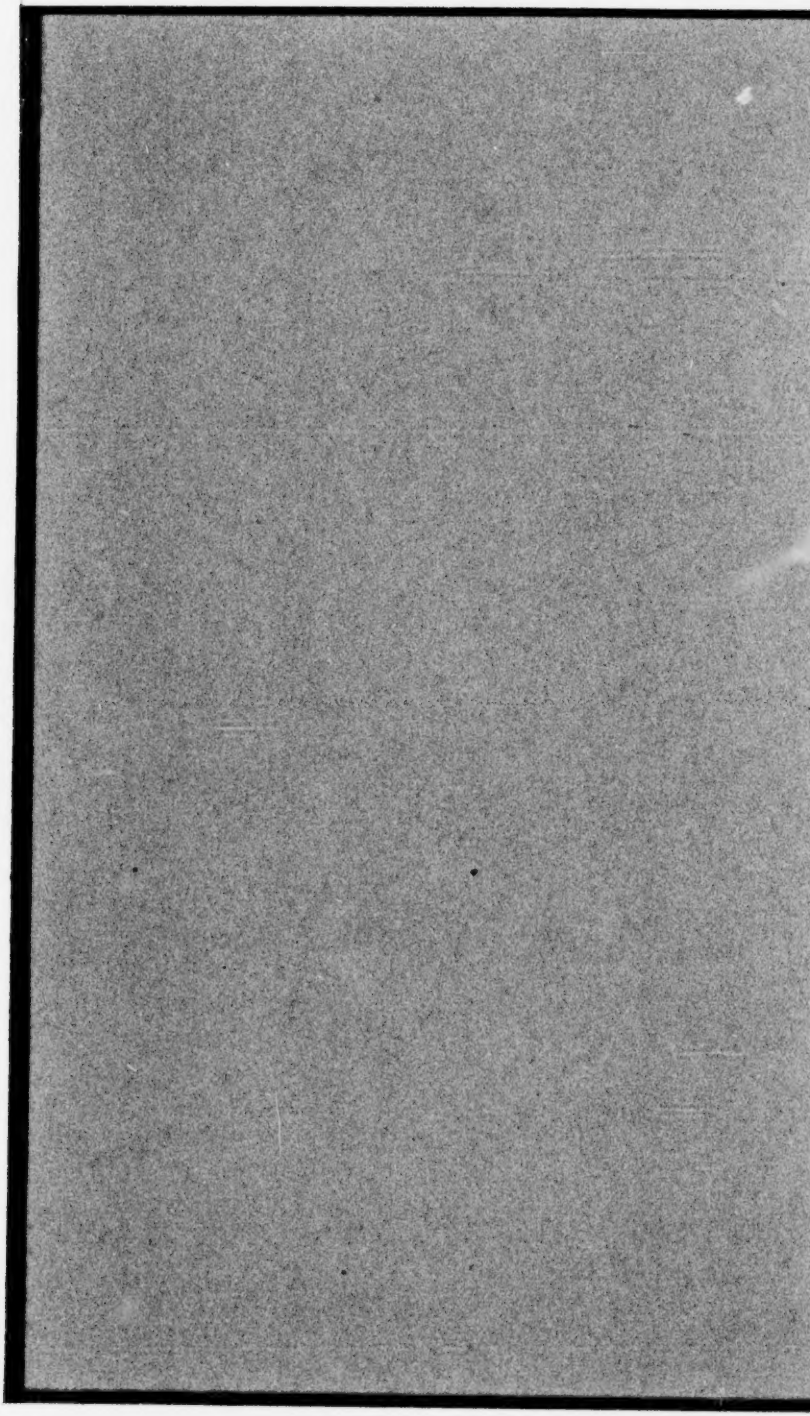

INDEX.

PAGE

The questions presented by the petitioner not involved 1

Reasons for not granting the writ 3

Conclusion 5

CITATIONS:

Cases:

Lamport & Holt v. *Elting*, 51 F. (2d) 1057..... 4

Lloyd Sabaudo v. *Elting*, 55 F. (2d) 1048..... 3

North German Lloyd v. *Elting*, 48 F. (2d) 547.. 3

Statutes:

Quota Act of May 19, 1921, c. 8 § 2, 42 Stat. 5.. 3

Act of May 11, 1922, c. 187 § 6, 42 Stat. 540.... 3

Immigration Act of 1924 (May 26, 1924), c. 190, 43 Stat. 154..... 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 885.

PHILIP ELTING, Collector of Customs, Port of New York,
Petitioner,

v.

NORTH GERMAN LLOYD.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Questions Presented by the Petitioner.

The three questions presented by the petitioner are not the questions involved in the case at bar. We quote from the opinion of the Court below:

> "This alien was brought to the United States in accordance with section 2 (a) (4) of the above-mentioned statute (42 Stat. 5), which provides that the quota shall not apply to 'aliens visiting the United States as tourists or temporarily for business or pleasure'. It is not claimed that the plaintiff acted in bad faith in bringing the alien here. We agree that it had no right to rely upon

the visa to establish his claimed status as a quota exempt. *United States ex rel. Spinosa* v. *Curran* (D. C.), 4 F. (2d) 613, affirmed 4 F. (2d) 614 (C. C. A. 2). But the plaintiff at least had probable cause to believe that the alien belonged to one of the classes to which the quota did not apply. If his claim was well founded, he was admissible, and the only way that could be finally determined was by the alien coming to some port of entry to the United States to present his evidence of his right to enter to the officials competent to pass upon it. The statute does not forbid bringing such an alien here so that he can satisfy the proper authorities, if possible, that he has the right to enter. *Compagnie Francaise de Navigation a Vapeur* v. *Elting* (C. C. A.), 19 F. (2d) 773. The admissibility of this alien did not depend upon any exercise of discretion by the Secretary of Labor as it did in *Dollar S. S. Co.* v. *Hyde*, 23 F. (2d) 910 (C. C. A. 9), where the fine was nevertheless held to have been unlawfully imposed; or in *North German Lloyd* v. *Elting*, 48 F. (2d) 547 (C. C. A. 2), where the imposition of fines was held lawful. Funk was not in an excluded class or admissible only in the discretion of the Secretary of Labor, but was a nonquota alien if his evidence was credible and of due weight, and so entitled to be heard by the proper officials and to have all his evidence in support of his claim to entry as of right duly considered by them in fixing his status. A transportation company acting in good faith is not liable to a fine for bringing him here for such a purpose. What was said in *Compagnie Francaise, etc.*, v. *Elting, supra*, on this subject applies with equal force to this case, for his right to enter was absolute if he came here temporarily on business."

Reasons for Not Granting the Writ.

1. The determination of the instant case only affects similar cases arising under the *Quota Act* of May 19, 1921, as amended by the Act of May 11, 1922. The alien herein involved and who was in possession of a passport visa bearing the notation "purpose to proceed to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration Law (*Quota Act*)" issued on January 24, 1924, was brought to the United States by the respondent on February 14, 1924.

The Quota Act was superseded by the Immigration Act of 1924 (Approved May 26, 1924). *So that for a period of eight years the Act, which the Government now asks this Honorable Court to construe, has not been the law of the land. For eight years the Secretary of Labor has not been operating under it.*

The construction of the *Quota Act* by the Court below is not erroneous as clearly appears from the opinion quoted above.

2. The decisions of the Second Circuit with which it is claimed the decision of the Circuit Court of Appeals, Second Circuit, in the instant case is in conflict, *are all decisions dealing with an entirely different statute, to wit, the Immigration Act of 1924.*

Two of them have to do with the admission of aliens afflicted with disease and physical disability:

> *Lloyd Sabaudo* v. *Elting*, 55 Fed. (2nd) 1048;
> *North German Lloyd* v. *Elting*, 48 Fed. (2nd) 547.

They have nothing to do with the Quota Act.

In the third case and the only other one referred to, *Lamport and Holt* v. *Elting*, 51 Fed. (2nd) 1057, the District Judge in his opinion says:

> "Section 6 of the Act of 1921 (Quota Act), as added by Joint Resolution of 1922, *differs* from section 16 of the Act of 1924 (8 U. S. C. A., §216). Section 16 definitely states that it shall be unlawful to bring to the United States any immigrant who does not have an unexpired immigration visa, or any quota immigrant having a non-quota visa" (p. 1059).

That case construes the law of a later, superseding and different statute.

3. As to the importance of the question involved. The Government's petition recites:

> "There is much litigation for recovery of these fines. In the District Court for the Southern District of New York there are approximately 2,000 causes of action of this character pending, and 555 of them involve the general question in the instant case. There are many presenting the precise issue here."

This statement is certainly ambiguous and not altogether intelligible. The Government can hardly mean that 2,000 suits have been brought to recover fines imposed upon steamship companies for bringing visitors who were held inadmissible by the immigration authorities and this under *a statute which ceased to be the law in 1924*! The question of the legality of a fine imposed for bringing an alien visitor under a defunct statute is all that is involved in the case at bar.

It is scarcely the fact to speak of the "present unsettled state of the law", when not a divergent construction of the *Quota Act* is pointed out in the Second Circuit, and none is mentioned from any other Circuit.

"Hardship to transportation companies" is non-existent now so far as the Quota Act is concerned *for it has not been the law since 1924.* We concede that while it was in force, 1921-1924, their hardships were numerous.

As to the "grave difficulties" in the interpretation of the Quota Act (*which has not been upon the statute books since 1924*), presented "to the Government officers charged with the administration of the immigration laws", we say with some confidence that immigration officials are not now engaged in wrestling with the dead past.

CONCLUSION.

Wherefore it is respectfully submitted that the petition should not be granted.

April, 1932.

MELVILLE J. FRANCE,
Counsel for North German Lloyd.

RESPONDENT'S BRIEF

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 42.

PHILIP ELTING, Collector of Customs, Port of New York,

Petitioner,

—against—

NORTH GERMAN LLOYD,

Respondent.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENT.

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INDEX.

PAGE

Opinions below 1

Statutes and regulations referred to 1

Statement 1

Summary of argument 4

Argument:

I—The fine was illegally imposed 6

II—A penal statute is involved and the respondent is not brought within both its spirit and letter .. 14

III—The question involved is the lack of jurisdiction of the Secretary of Labor, not one of an erroneous finding 14

Conclusion 15

Appendix (statutes and regulations) 17

TABLE OF CASES CITED:

Compagnie Francaise de Navigation a Vapeur v. *Elting*, 19 Fed. (2d) 773 10

Dawson v. *Shaw*, 28 Pa. Super. Ct. 563 14

Dollar S. S. Line v. *Hyde*, 23 Fed. (2d) 910 10

Field v. *United States*, 137 Fed. 6 14

Gonzales v. *Williams*, 192 U. S. 1 ..... 14, 15

Ex parte Koerner, 176 Fed. 478 14

Oceanic Nav. Co. v. *Stranahan*, 214 U. S. 321 14

PAGE

United States v. *Ju Tog*, 198 U. S. 253..... 14
United States v. *Sheldon*, 2 Wheat. 119..... 14
United States v. *Curran*, 4 Fed. (2d) 613, affirmed 4 Fed. (2nd) 614..... 8
United States v. *Commissioner*, 13 Fed. (2d) 943, 944.. 7
Ex parte Watchorn, 160 Fed. 1014, 1016.....14, 15

OTHER AUTHORITIES CITED:

Quota Act of 1921, 42 Stat. 5, as amended by Act of May 11, 1922, 42 Stat. 540....2, 4, 5, 6, 7, 8, 9, 12, 13, 17
Immigration Act of 1924, 43 Stat. 153.....4, 20
Immigation Rules of February 1, 1924.....12, 13, 22
General Instruction Consular No. 839.....11, 22
36 Cyc. 1165..... 13
36 Cyc. 1187..... 14

IN THE

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No. 42.

PHILIP ELTING, Collector of Customs, Port of New York,
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—against—

NORTH GERMAN LLOYD,
Respondent,

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the District Court for the Southern District of New York, granting summary judgment for the respondent, is set forth on page 15 of the Record; the opinions of the Circuit Court of Appeals on pages 19-21 of the record (54 Fed. (2d) 997).

Statutes and Regulations Referred to.

These are set forth in the appendix to this brief.

Statement.

There are no disputed questions of fact.

On the 14th day of February, 1924, the respondent brought to the United States on its Steamship "Bremen" a German alien named Joseph Funk. When Joseph Funk

arrived at the Port of New York he was detained by the immigration officials at Ellis Island. He was the holder of a German passport issued to him at Alzeman, Germany, and was the holder of a passport visa No. 96 issued to him by the Consul of the United States at Munich, Germany, dated January 24th, 1924, bearing the notation "purpose to proceed to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration Law."

Section 2 (a) (4) of the Restrictive Immigration Law (the Quota Act) of May 19, 1921, as amended May 11, 1922, provided, in part as follows:

> "That the number of aliens of any nationality who may be admitted under the immigration laws of the United States in any fiscal year shall be limited to 3 per centum of the number of foreign born persons of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following and they shall not be counted in reckoning in any of the percentage limits provided in this Act; * * * (4) aliens visiting the United States as tourists or temporarily for business or pleasure."

After examination before the Board of Special Inquiry Funk was ordered deported on the ground that he was a quota immigrant, based upon the decision that upon the facts elicited on his examination it did not appear to the immigration officials that he had come to the United States for business or pleasure. This decision seems to have been based largely upon the determination that Funk had very small funds and that it did not seem plausible that he had come to the United States for the purpose of collecting a legacy of $400.

After the decision of the Secretary of Labor that Funk

should be deported the said Secretary on August 4th, 1924, sent a notice to the respondent stating that from the ascertained facts it was indicated that a fine of $200 and the amount of the alien's passage money should be imposed upon the ground that the respondent had brought the said Joseph Funk to the United States in excess of the quota for the fiscal year beginning July 1st, 1923. (Of course, if the alien was to be included in the quota, the quota had been exhausted and therefore he was properly excluded.)

The respondent filed its protest through its attorney, with the Commissioner General of Immigration. In part, that protest said:

> "It is respectfully submitted that according to the minutes the notation on the passport in this case reads, 'Proceeds to the United States on business only, etc., and that the testimony of passengers as well as of relatives clearly indicates that the passenger would leave this country immediately after an inheritance was settled.
>
> "Attention is called to the fact that the notation made by the Consul and the statement made by the passengers before the B. S. I. justify the Department in concluding that the North German Lloyd's officials acted in good faith" (R. 25).

Notwithstanding the said protest and the facts herein, the respondent was notified by the Secretary of Labor that the said fine and refund would not be refunded and that the notation of the American Consul upon the passport visa of the said Joseph Funk "was not a guaranty of the alien's exempt status" (R. 18).

It is admitted that on January 31st, 1925, in order to secure the clearance of the Steamship "Bremen" the sum of $310, fine and refund, was paid to the defendant.

It should be added that the only appropriate immigration officers of the United States who could finally decide

and pass upon the admissibility of Joseph Funk as an alien visiting the United States temporarily for business and as coming within the provision of the law quoted above, were located and stationed in the United States.

This case arises under the Quota Act of May 19th, 1921, as amended by the Act of May 11th, 1922, which was superceded by the Immigration Act of 1924. *Neither the Immigration Act of 1917 nor the Immigration Act of 1924 are involved.*

Summary of Argument.

I.

The fine was not legally imposed. The petitioner has confused the propriety of deportation of the alien with the legality of fining the carrier for bringing. He bases the authority for his action solely upon one section (6) of the Quota Act of 1921 and ignores section 2 of the same act. The alien was brought to the United States by the respondent in accordance with section 2 (a) (4) of the Quota Act, which provides that the quota shall not apply to "aliens visiting the United States as tourists or temporarily for business or pleasure". If the alien's claim was well founded, he was admissible, and that could be only determined by the alien coming to the United States to present his evidence of his right to enter to the only officials authorized to pass upon it. The statute does not forbid bringing such an alien to the United States so that he can satisfy the proper authorities that he has that right. The right of the alien to enter was absolute if he came here temporarily on business. He was not in an excluded class but was a nonquota alien if his claim was believed and accepted by the immigration officials and so entitled to be heard by the proper officials and to have his evidence in support of his claim to entry *as of right* duly considered by

them in fixing his status. Until the alien arrived in the United States and until, by what was in effect a quasi-judicial determination, the immigration officials decided the alien was a "quota" immigrant, the penalized status did not exist. The position of the petitioner reduces substantially to the following: the government, under the statute, says, in effect, to the alien: "If you are visiting the United States for business you are exempt from the Quota Act but you must present that claim to the immigration officials in the United States who are the only persons who can pass upon it"; and to the carrier: "We will fine you if you bring the alien to the United States so that he may present his case".

II.

It is attempted to bring the respondent within a penal statute and it is elementary that to enforce a penalty against a person he must be brought clearly within both the spirit and the letter of the statute. In the instant case not only is the respondent not brought within the letter of the statute but the infliction of the penalty would clearly transgress its spirit.

III.

No question of an erroneous finding by the Secretary of Labor is involved. The question, on the contrary, upon the admitted and undisputed facts, is one of lack of jurisdiction on the part of the Secretary of Labor. Upon the admitted facts, the plaintiff was not within the prohibition of the statute. What we have in the case at bar is *not* the question of the review or of an erroneous finding, but a total lack of jurisdiction.

Argument.

I.

A fine should not be imposed and the carrier should not be penalized for bringing to the United States an alien whose admissibility could only be determined by immigration officials in the United States and who had the right to have his status as a "non quota" immigrant, if it was questioned, determined by the resident United States officials.

The question of whether or not the alien in question should have been admitted temporarily as a visitor rested entirely with the immigration authorities in this country. The Secretary of Labor might with propriety exclude the alien but he had no authority or power to fine the Line for bringing him.

The statute under which the Secretary of Labor presumed to act is the so-called Quota Act (Act of May 19, 1921, as amended May 11, 1922).

The sections of that act which are involved are set forth in the appendix hereto.

The act excluded from its operation, among others, "aliens visiting the United States as tourists or temporarily for business or pleasure", who were *not* included within the quota.

The regulations in effect at the time restated and amplified the act by excluding from its operation "aliens visiting the United States as tourists or temporarily for business or pleasure *for a period not to exceed six months*", who were *not* included within the quota. Visitors were, therefore, not quota aliens. There was no bar to their entry. Congress gave them the unqualified right to enter the United States.

It was only excess quota aliens who were barred from

entry by the Quota Act. The penalty clause of the act (Section 6), directed against the carrier—the instrumentality bringing the excess quota alien—imposed a fine for bringing an alien "not admissible under the terms of this Act or regulations made thereunder". It was for bringing an excess quota alien that a carrier was penalized. It was upon that alleged ground the respondent was fined—"for bringing to the United States the alien Joseph Funk, in excess of quota" (R. 17).

The alien here involved, claiming himself to be visiting the United States for business and so certified by the United States Consul at Munich, Germany, did not become an excess quota alien until that determination was made by the immigration authorities upon his arrival in the United States.

The validity of the claim that the alien was visiting the United States for business was one which could be only determined by the immigation officials *here,* to whom the alien had the right to present the merits of his claim. Upon any given state of facts they were the judges. Until their decision was rendered *after the arrival of the alien* his status was that of one who did not come within the provisions of the Act.

That determination of the exempt status of "visitors" can only be determined by the Immigration officials in the United States to whom the proof is to be presented, has been repeatedly affirmed.

So in *United States* v. *Commissioner,* 13 Fed. (2nd) 943, 944, the Court said:

> "The designation of these aliens as temporary visitors by the vice consul is to be regarded simply as a statement of their claim, the validity of which remained *to be determined by the immigration authorities upon their arrival in this country."*

See also *United States* v. *Curran*, 4 Fed. (2nd) 613, affirmed 4 Fed. (2nd) 614, where the Court said:

> "The statement was simply an indication by the vice consul as to the class to which relator claimed he belonged, for use of the authorities here. In other words, it was a statement of claim by relator, *the validity of which remained to be determined upon his arrival.*"

The Act, therefore, makes it unlawful to bring to the United States any alien after the quota of his nationality has been admitted except that aliens visiting the United States temporarily for business shall not be counted in the quota.

It follows that a temporary visitor is not a quota immigrant and is, therefore, not an excess quota immigrant for bringing whom the carrier is subject to fine. Section 6 of the Quota Act in the language "any alien not admissible under the terms of this Act" must mean an excess quota immigrant, not an alien who is in a class which is excluded from the Act.

Who can and must determine this latter fact? Only the immigration officials in the United States to whom the alien in question certainly has the right to present the merits of his claim. We say "certainly" advisedly. Otherwise the carrier is privileged to bring only such aliens as *it* thinks ought to be admitted and the alien never has the opportunity to submit his claim to those who alone have the right to pass upon it.

To adopt the petitioner's contention, that the carrier *acts at its risk,* leads to the following anomalous and impossible situations:

The carrier would be required to be the judge (Sec. 2 [a] Quota Act) of the admissibility of following:

(1) *Aliens who are Government officials, their families, attendants, servants and employees.*

(2) Aliens in continuous transit through the United States.

(4) *All alien tourists.*

(5) Aliens from countries immigration from which is regulated in accordance with treaties or agreements relating solely to immigration.

(8) *Aliens under the age of eighteen who are children of citizens of the United States.*

The above are all in the same category as aliens visiting for business.

To hold that the carrier must investigate the merits of the claims of aliens in the foregoing classes and at its peril transport them, transcends the purpose and spirit of the statute and is not in accordance with its letter.

Determination of whether an alien's purpose or intention is to visit the United States for business is after all a determination of a mental purpose or intention and that in the final analysis, no matter what the United States Consul may say, no matter what the alien may say, is and can only be determined by the immigration officials to whom he is entitled to present his proof after his arrival in the United States.

Until the alien arrived in the United States and until, by what in effect was a quasi judicial determination, the immigration officials decided the alien was a "quota" immigrant, the penalized status did not exist.

Under the Quota Act, a "visitor" was not included among "quota" immigrants. The American Consul in the instant case certified that the alien was a "visitor". The alien remained in that class or at least he was not a "quota" immigrant until that determination was made by the immigration authorities here to whom he must present his proof and who alone could pass upon it.

The determination of the question of "status" was hidden in the minds of the proper immigration officials in New York and only became a matter of knowledge and legal fact when these officials had acted here in the United States and *after* the arrival of the alien in the United States and the presentation of his case to them. Knowledge on the part of the respondent shipowner could not exist until the immigration officials at New York had spoken *after* the alien had been brought under the direct authority of the Secretary of Labor.

The ruling which is here urged has the support of every Circuit Court of Appeals which has been called to pass upon it.

As was said in the case of *Compagnie Francaise de Navigation a Vapeur* v. *Elting,* 19 Fed. Rep. (2d) 773:

> "To hold that the transportation company acts at its peril in bringing an alien who claims to be exempt from the quota would be a practical denial to the alien of the privilege of presenting his evidence. No company would bring him on such terms. To hold that the company must investigate the merits of the alien's claim, and is privileged to bring only such aliens as it thinks ought to be admitted, is to make it, rather than the immigration officials, pass upon the alien's claim—which is not the privilege granted the alien by the regulation."

And again as was said by the Court in *Dollar S. S. Line* v. *Hyde,* 23 Fed. Rep. (2d) 910:

> "What action the secretary would probably take in the case of a domiciled alien afflicted with a contagious disease is an immaterial consideration; we are concerned only with the extent of his power, and not with the considerations which may weigh with him in the exercise of his discretion. It would seem

to follow that, if the secretary has such power, the alien must be permitted to invoke the exercise thereof by presenting himself at a port of entry, and hence a carrier cannot be penalized for transporting him for that purpose. *Compagnie Francaise, etc.* v. *Elting* (C. C. A.), 19 F. (2d) 773."

The Consular General Instructions, No. 839, July 14, 1922 (in effect until June 12, 1924), confirm the interpretation which is here urged.

A co-ordinate Department of the Federal Government, the Department of State, charged with co-operating with the Department of Labor, in the enforcement of the statute involved, gave to it the same construction which the court below gave.

We quote from the official consular instructions:

"Consular officers are, however, not authorized to assume abroad the functions vested by law in the immigration officers of the United States of deciding upon the admissibility of aliens after arrival at an American port."

"If an alien, after submitting to a consular officer the alien's declaration on Form 228, appears in the consul's judgment to fall clearly under one of the classes liable to exclusion, the consul shall so advise the alien, informing him of the serious risk he is taking in attempting to enter the United States and acquainting him with the probability that he will be excluded from the United States and deported. If the alien nevertheless insists upon proceeding, the consular officer shall visa his passport if it is valid, and there is no other reason for refusal."

It becomes quite apparent from a reading of these instructions:

1. That the determination of admissibility (whether

or not the alien is or is not a "visitor") can only be decided by the immigration officials in the United States.

2. But because of the right which the alien has of having his status determined by the immigration officers in the United States, the consular officer, even though in his judgment the alien will fail in his claim, nevertheless is required to visa the alien's passport, *so that the alien may proceed to the United States and have his claim passed upon by the only body which can do so.*

We have as a result one department of government recognizing the fact that it must give the alien an opportunity of presenting his claim to the officials of the immigration bureau in the United States, and a coordinate department urging that a person who provides the facilities which will enable an alien to do the same thing, shall be penalized.

We submit that it borders upon absurdity—certainly it is the height of injustice—for the government, which is seeking to enforce a penal statute, to say in effect (to the alien): "You may present your case in the United States" and (to the carrier): "We will fine you if you bring that alien to the United States so that he may present his case."

As has already been stated we are dealing with a statute which has not been the law since 1924. We parallel the two clauses dealing with the subject of penalty, as found in the Quota Act and the superceding Immigration Act of 1924:

Quota Act.	Immigration Act 1924.
"Sec. 6. That it shall be unlawful for any person, including any transportation company other than railway lines entering the United	"Sec. 16(a). It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer or con-

States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien not admissible under the terms of this Act or regulations made thereunder.

signee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant."

The petitioner's brief endeavors to give the old Quota Act section the same construction that the present Immigration Act of 1924 section carries. It is submitted that the contention is unsound. It will always be presumed that the legislature, in adopting the amendment, intended to make some change in the existing law.

36 Cyc. 1165.

In the present instance there is no need of presumption; the change stands out distinctly.

Petitioner's argument *in terrorem* that affirmance herein leaves the field open for any alien, no matter how doubtful his chances of admission, to present his claim to officials in this country, is, to say the least, far fetched. *The Quota Act, with which we are alone concerned, has not been the law since 1924. No alien since that date has come under its provisions. No alien hereafter ever will.*

Since 1924 every immigrant's rights and every carrier's rights have been determined by the Immigration Act of 1924, which provides an entirely new and different plan of admittance and definition.

II.

It is attempted to bring the respondent within a penal statute and it is fundamental that to enforce a penalty against a person, he must be brought clearly within both the spirit and the letter of the statute.

36 Cyc. 1187;
United States v. *Sheldon,* 2 Wheat. 119;
Field v. *United States,* 137 Fed. Rep. 6;
Dawson v. *Shaw,* 28 Pa. Super. Ct. 563.

In the instant case not only is the respondent not brought clearly within the letter of the statute but the infliction of the penalty would clearly transgress the spirit of the statute.

III.

No question is involved of an erroneous finding; the question is one of lack of jurisdiction on the part of the Secretary of Labor. Upon the admitted facts, the plaintiff was not within the prohibition of the statute.

"While the courts are bound by findings duly made by the executive branch in matters of this kind (citing *U. S.* v. *Ju Toy,* 198 U. S. 253; *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 321), they cannot properly refuse relief where upon the admitted facts it appears as a matter of law, that the person sought to be deported is not within the inhibition of the statute."

Gonzales v. *Williams,* 192 U. S. 1;
Ex parte Watchhorn, 160 Fed. 1014;
Ex parte Koerner, 176 Fed. 478, 479.

"Doubtless the determination of the immigration authorities upon all questions of fact, even if made upon legally incompetent or inconclusive evidence is final, but when the proceedings, before them snow undisputably that they are acting without jurisdiction, relief may be had."

Ex parte Watchorn, 160 Fed. 1014, 1016;
See *Gonzales* v. *Williams,* 192 U. S. 1.

What we have in the case at bar is *not* the question of the review or an erroneous finding, but a total lack of jurisdiction. The facts upon which the Secretary of Labor was authorized to act, were completely absent.

CONCLUSION.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

MELVILLE J. FRANCE,
Counsel for Respondent.

October, 1932.

Appendix.

STATUTES AND REGULATIONS.

THE QUOTA ACT.

(Act of May 19, 1921, as amended May 11, 1922.)

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the operation of the act entitled "An act to limit the immigration of aliens into the United States," approved May 19, 1921, is extended to and including June 30, 1924.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * * *

Sec. 2. (a) That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910. *This provision shall not apply to* the following, and they shall not be counted in reckoning any of the percentage limits provided in this act: (1) Government officials, their families, attendants, servants, and employees; (2) aliens in continuous transit through the United States; (3) aliens lawfully admitted to the United States who later go in transit from one part of the United States to another through foreign contiguous territory; (4) *aliens visiting the United States as tourists or temporarily for business or pleasure;* (5) aliens from countries immigration from which is regulated in accordance with treaties or agreements relating solely to immigration; (6) aliens from the so-called Asiatic barred zone, as described in section 3 of the immigration act;

(7) aliens who have resided continuously for at least five years immediately preceding the time of their application for admission to the United States in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, countries of Central and South America, or adjacent islands; or (8) aliens under the age of eighteen who are children of citizens of the United States.

(b) For the purposes of this act nationality shall be determined by country of birth, treating as separate countries the colonies or dependencies for which separate enumeration was made in the United States census of 1910.

(c) The Secretary of State, the Secretary of Commerce, and the Secretary of Labor, jointly, shall, as soon as feasible after the enactment of this act, prepare a statement showing the number of persons of the various nationalities resident in the United States as determined by the United States census of 1910, which statement shall be the population basis for the purposes of this act. In case of changes in political boundaries in foreign countries occurring subsequent to 1910 and resulting (1) in the creation of new countries, the Governments of which are recognized by the United States, or (2) in the transfer of territory from one country to another, such transfer being recognized by the United States, such officials, jointly, shall estimate the number of persons resident in the United States in 1910 who were born within the area included in such new countries or in such territory so transferred, and revise the population basis as to each country involved in such change of political boundary. For the purpose of such revision and for the purposes of this act generally aliens born in the area included in any such new country shall be considered as having been born in such country, and aliens born in any territory so transferred shall be considered as having been born in the country to which such territory was transferred.

(d) When the maximum number of aliens of any nationality who may be admitted in any fiscal year under this act shall have been admitted all other aliens of such nationality, except as otherwise provided in this act, who may apply for admission during the same fiscal year shall be excluded: Provided, That the number of aliens of any nationality who may be admitted in any month shall not exceed 20 per centum of the total number of aliens of such nationality who are admissible in that fiscal year; Provided further, That aliens returning from a temporary visit abroad, aliens who are professional actors, artists, lecturers, singers, nurses, ministers of any religious denomination, professors for colleges or seminaries, aliens belonging to any recognized learned profession, or aliens employed as domestic servants, may, if otherwise admissible, be admitted notwithstanding the maximum number of aliens of the same nationality admissible in the same month or fiscal year, as the case may be, shall have entered the United States; but aliens of the classes included in this proviso who enter the United States before such maximum number shall have entered shall (unless excluded by subdivision (a) from being counted) be counted in reckoning the percentage limits provided in this act; Provided further, That in the enforcement of this act preference shall be given so far as possible to the wives, parents, brothers, sisters, children under eighteen years of age, and fiancees, (1) of citizens of the United States, (2) of aliens now in the United States who have applied for citizenship in the manner provided by law, or (3) of persons eligible to United States citizenship who served in the military or naval forces of the United States at any time between April 6, 1917, and November 11, 1918, both dates inclusive, and have been separated from such forces under honorable conditions.

Sec. 6. That it shall be unlawful for any person, including any transportation company other than railway

lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States either from a foreign country or any insular possession of the United States any alien not admissible under the terms of this act or regulations made thereunder, and if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. No vessel shall be granted clearance papers pending the determination of the liability to the payment of such fine, or while the fine remains unpaid; except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine. Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such person, or the owner, master, agent, or consignee of the vessel, prior to the departure of the vessel from the last seaport in a foreign country or insular possession of the United States.

Approved May 19, 1921, as amended by Public Resolution No. 55, approved May 11, 1922.

The Immigration Act of 1924, 43 Stat. 153 (U. S. C. Title 8, Sec. 216), Section 16:

> SEC. 16. (a) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee

of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant.

(b) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person, or transportation company, or the master, agent, owner, charterer, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, and in addition a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. No vessel shall be granted clearance pending the determination of the liability to the payment of such sums, or while such sums remain unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of an amount sufficient to cover such sums, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(c) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such person, and the owner, master, agent, charterer, and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a

quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a non-quota immigrant.

Immigration Rules of February 1, 1924:

Rule 9, subdivision E.—Aliens visiting the United States as tourists or temporarily for business or pleasure for a period not to exceed six months shall not be subject to the provisions of section 2 (a) of said Act of May, 1921, as amended, nor shall they be counted in reckoning any of the percentage limitations provided in said act.

General Instruction Consular, No. 839, issued by the Secretary of State on July 14, 1922, and in effect until June 12, 1924, provided in part:

SEC. 12. * * *. In the work of alien visa control it is the desire of the Department that consular officers shall be of the greatest possible assistance to the Bureau of Immigration, Department of Labor. Consular officers are, however, not authorized to assume abroad the functions vested by law in the immigration officers of the United States of deciding upon the admissibility of aliens after arrival at an American port.

Nevertheless, in order to prevent or avoid so far as possible hardships and dangers involved in deportation under present conditions, the consular officer to whom a passport is presented for visa shall endeavor to ascertain as far as practicable whether the holder is a member of any of the classes excluded from the United States by the provisions of section 3 of the immigration act of February 5, 1917. If an alien, after submitting to a consular officer the alien's declaration on Form 228, appears in the consul's judgment to fall clearly under one of the

classes liable to exclusion, the consul shall so advise the alien, informing him of the serious risk he is taking in attempting to enter the United States and acquainting him with the probability that he will be excluded from the United States and deported. If the alien nevertheless insists upon proceeding, the consular officer shall visa his passport if it is valid, and if there is no other reason for refusal.

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P 4

SUPREME COURT OF THE UNITED STATES.

No. 42.—October Term, 1932.

Philip Elting, Collector of Customs, Port of New York, Petitioner, *vs.* North German Lloyd.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 5, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent, an operator of steamships, brought suit in the District Court for Southern New York, to recover a fine imposed on it by the Secretary of Labor, under § 6 of the Quota Act of 1921, c. 8, 42 Stat. 5, as amended May 11, 1922, c. 187, 42 Stat. 540, for bringing into the United States an alien, inadmissible under that Act. Upon pleadings and affidavits, the District Court gave summary judgment for the respondent which was affirmed by the Court of Appeals for the Second Circuit, 54 F. (2d) 997. The case is here on certiorari, 286 U. S. 538.

The Quota Act of 1921 imposed restrictions on the number of immigrants of any nationality who might annually be admitted to the United States, but provided by § 2 (a) (4) that the restriction should not apply to "aliens visiting the United States as tourists or temporarily for business or pleasure". The 1922 amendment of the Act added § 6,[1] which provides:

"That it shall be unlawful for any person . . . to bring to the United States . . . any alien not admissible under the terms of this Act or regulations made thereunder, and if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought, such person . . . shall pay to the collector of customs . . . the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation . . . such latter sum to be delivered . . . to the alien . . . ."

[1] § 6 of the Quota Act was superseded by § 16 of the Immigration Act of 1924, c. 190, 43 Stat. 153, 163, 8 U. S. C., § 216.

The section also provides:

"Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such person . . . prior to the departure of the vessel . . . ."

The record in the present case raises no question of the correctness or sufficiency of the procedure before the Secretary of Labor. The only issue is the legality upon the unchallenged facts of the imposition of the fine and the refusal of the Secretary to remit it.

On February 14, 1924, respondent brought a German alien to the United States on its steamship "Bremen". On embarkation the alien had represented to the respondent that he was going to the United States on a temporary visit for the purpose of collecting an inheritance, and was in possession of a United States consular visa, bearing the notation: "Purpose to proceed to the United States on business only within the meaning of § 2 of the Restrictive Immigration Law". Upon arrival in the United States the alien was detained by immigration officials and upon a hearing before a Board of Special Inquiry his claim that he was visiting the United States temporarily for business was rejected. He was ordered deported, on the ground that he was a quota immigrant and the quota applicable to his nationality was then exhausted. At the hearing before the Board it appeared that he arrived without money or a return ticket. His passage had been paid by a relative in the United States. He claimed to be coming to the United States to collect an inheritance of $400, but was without documentary evidence to support this claim, and it had cost him nearly one-half of the amount of the legacy to come here.

The Secretary notified the respondent that the ascertained facts indicated its liability to a fine (including the repayment of passage money) for bringing the alien to the United States, but permitted the vessel to clear upon respondent's depositing with the collector under protest the amounts to be paid. The imposition of the fine was protested on the ground that respondent had accepted the alien for transportation in good faith, in reliance upon the consular visa and the notation upon it. It does not appear that the respondent made any inquiry as to the truth of the alien's claim to be a temporary visitor to the United States for the purpose of

collecting an inheritance. After a hearing, the Secretary required payment of the fine and passage money and refused to remit the penalties.

The court below held that the fine was illegally imposed, for if the alien was in fact within the excepted class, he was admissible; hence it was lawful for him to come to the United States to present evidence in support of his right to enter, and it was lawful for the respondent to bring him. The respondent argues here, in addition, that the general purpose of the Quota Act was to exclude immigrants, and the provisions of § 6 imposing penalties for bringing an "alien", must be read as applicable only to aliens who seek admission as immigrants.

The statute itself answers the contention that the Act does not apply because the alien did not embark as an immigrant. § 6 refers to "any alien not admissible under the terms of this Act" and § 2 (d) provides that when the aliens of any nationality admitted in any fiscal year shall exceed the quota "all other aliens of such nationality, except as otherwise provided in this Act, who may apply for admission during the same fiscal year, shall be excluded". Thus all aliens, whether they seek admission as immigrants or not, if they are not within the quota or one of the excepted classes, are "not admissible under the terms of" the Quota Act.

We do not think it can be said, in the face of the explicit language of the statute, that the respondent could lawfully bring the alien, because he lawfully might come to the United States. The statute imposes no penalty upon the alien for coming beyond the possible denial of his application to enter. But it does declare that it shall be unlawful for the steamship company to bring him if "not admissible", as was the case, and imposes the penalty if the Secretary finds, as he did, that an inadmissible alien has been brought. In plain terms the Act placed on respondent the burden of acting at its peril that the fine might be imposed in the case of this alien, as with any other, if the event should prove that he was inadmissible. Whether the same result would follow if, as in *Compagnie Francaise de Navigation a Vapeur* v. *Elting*, 19 F. (2d) 773; see *North German Lloyd* v. *Elting*, 48 F. (2d) 547, 549, the line transported an alien entitled under the Immigration Rules to present evidence that he

had not abandoned a domicil previously acquired in the United States, we need not now determine.

The burden which the statute imposes on the transportation companies is lightened, though not removed,[2] by the provision authorizing the Secretary to remit the fine if it appears to his satisfaction that the inadmissibility of the alien could not have been ascertained by the steamship company "by the exercise of reasonable diligence" before sailing. We assume that it was the duty of the Secretary to remit the fine if the evidence established that the alien's inadmissibility could not have been ascertained by respondent by the exercise of reasonable diligence before the vessel sailed. But we cannot say that the discretion which, under the statute he alone may exercise, was abused. Respondent was bound to know the law that the consular visa on the alien's passport did not entitle him to entry as a member of the ~~accepted~~ excepted class. Cf. *United States ex rel. Spinosa* v. *Curran,* 4 F. (2d) 613, affirmed, 4 F. (2d) 614. The Secretary gave respondent a hearing and acted on substantial evidence, already detailed, tending to show that by the exercise of reasonable diligence in making inquiry of the alien before sailing, the respondent could have ascertained that he was not entitled to admission as a member of the excepted class.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[2]Section 6 of the Quota Act of 1921 was added by amendment of May 11, 1922, c. 187, 42 Stat. 540. The amendment as originally introduced imposed a fine upon the steamship company for bringing to the United States an alien who was inadmissible under the statute and ended with the words "and such fine shall not be remitted or refunded". In conference the words quoted were deleted and what is now the third sentence of § 6, providing for remission of the fine by the Secretary, was substituted. H. R. No. 945, 67th Cong., 2d Sess. Before this change the effect of the section was to impose the fine without qualification if the steamship company brought to the United States an inadmissible alien. The addition of provisions for remission of the fine, once imposed, did not alter its meaning.